DOCKET

No. 08-1198

Title: Stolt-Nielsen S.A., et al., Petitioners
v.
AnimalFeeds International Corp.

Docketed: March 27, 2009
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (06-3474)
Decision Date: November 4, 2008
Rehearing Denied: January 12, 2009

Questions Presented

Date	Proceedings and Orders
Mar 26 2009	Petition for a writ of certiorari filed. (Response due April 27, 2009)
Apr 20 2009	Order extending time to file response to petition to and including May 11, 2009.
Apr 23 2009	Brief amicus curiae of Association of Ship Brokers & Agents (U.S.A.), Inc. filed.
Apr 24 2009	Brief amicus curiae of Society of Maritime Arbitrators, Inc. filed.
Apr 27 2009	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
May 11 2009	Brief of respondent AnimalFeeds International Corp. in opposition filed.
May 26 2009	DISTRIBUTED for Conference of June 11, 2009.
May 26 2009	Reply of petitioners Stolt-Nielsen S.A., et al. filed. (Distributed)
Jun 15 2009	Petition GRANTED.
Jul 6 2009	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including August 28, 2009.
Jul 6 2009	The time within which to file respondent's brief on the merits is extended to and including October 20, 2009.
Aug 6 2009	Consent to the filing of amicus briefs, in suport of either party or of neither party, received from counsel for the petitioners.
Aug 12 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondent.
Aug 28 2009	Joint appendix filed. Statement of costs received.
Aug 28 2009	Brief of petitioners Stolt-Nielsen S.A., et al. filed.
Sep 2 2009	Brief amicus curiae of Pacific Legal Foundation filed.
Sep 3 2009	Brief amicus curiae of Equal Employment Advisory Council filed.
Sep 4 2009	Brief amicus curiae of DRI -The Voice of the Defense Bar filed.
Sep 4 2009	Brief amicus curiae of CTIA - Wireless Association filed.
Sep 4 2009	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Sep 4 2009	Brief amicus curiae of American Arbitration Association filed.
Sep 4 2009	Brief amici curiae of Association of Ship Brokers and Agents, et al. filed.
Sep 28 2009	SET FOR ARGUMENT ON Wednesday, December 9, 2009.
Sep 29 2009	CIRCULATED
Oct 20 2009	Brief of respondent AnimalFeeds International Corp. filed. (Distributed)
Oct 22 2009	Record received from the U.S.C.A. for the 2nd Circuit. (1 box)
Oct 22 2009	Record received from the U.S.D.C. for Southern District of New York. (1 box)
Oct 27 2009	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.

(Distributed)

Oct 27 2009 Brief amici curiae of Public Justice, and Public Good filed. (Distributed)

Oct 27 2009 Brief amicus curiae of Public Citizen, Inc. filed. (Distributed)

Oct 27 2009 Brief amici curiae of American Association for Justice, and AARP filed. (Distributed)

Oct 27 2009 Brief amicus curiae of Dub Herring Ford Lincoln-Mercury, Inc. filed. (Distributed)

Oct 27 2009 Brief amicus curiae of American Antitrust Institute, et al. filed. (Distributed)

Nov 19 2009 Reply of petitioners Stolt-Nielsen S.A., et al. filed. (Distributed)

Dec 9 2009 Argued. For petitioners: Seth P. Waxman, Washington, D.C. For respondent: Cornelia T. L. Pillard, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,
Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), this Court granted certiorari to decide a question that had divided the lower courts: whether the Federal Arbitration Act permits the imposition of class arbitration when the parties' agreement is silent regarding class arbitration. The Court was unable to reach that question, however, because a plurality concluded that the arbitrator first needed to address whether the agreement there was in fact "silent." That threshold obstacle is not present in this case, and the question presented here--which continues to divide the lower courts—is the same one presented in *Bazzle*:

Whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*

PARTIES TO THE PROCEEDING BELOW

The case caption contains the names of all parties who were parties in the court of appeals. KP Chemical Corp. appears in the court of appeals caption, but it was not a party in that court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioners state as follows:

Petitioner Stolt-Nielsen Transportation Group Ltd. is a wholly owned subsidiary of petitioner Stolt-Nielsen S.A., a publicly traded corporation. Stolt-Nielsen S.A. has no parent corporation and no publicly held company owns 10 percent or more of its stock.

Petitioners Odfjell Seachem AS and Odfjell USA, Inc. are wholly owned subsidiaries of petitioner Odfjell ASA, a publicly traded corporation. Odfjell ASA has no parent corporation and no publicly held corporation owns 10 percent or more of its stock. (Since this case commenced, Odfjell Seachem AS has changed its name to Odfjell Tankers AS, and Odfjell ASA has changed its legal status from an ASA to an SE.)

Petitioner Jo Tankers B.V. has one parent corporation, Jo Tankers (Bermuda) Limited, and no publicly held corporation owns 10 percent or more of the stock of Jo Tankers B.V. or Jo Tankers (Bermuda) Limited. Petitioner Jo Tankers, Inc. is a wholly owned subsidiary of Jo Tankers B.V., which is not a publicly traded corporation.

Mitsui O.S.K. Lines Ltd., a publicly traded corporation, owns 10 percent or more of the stock of petitioner Tokyo Marine Co., Ltd.

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IN THE

Supreme Court of the United States

No. 08-

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

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ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners Stolt-Nielsen S.A.; Stolt-Nielsen Transportation Group Ltd.; Odfjell ASA; Odfjell Seachem AS; Odfjell USA, Inc.; Jo Tankers B.V.; Jo Tankers, Inc.; and Tokyo Marine Co., Ltd. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-32a) is reported at 548 F.3d 85. The opinion of the district

court vacating the arbitrators' partial final award (App. 35a-44a) is reported at 435 F. Supp. 2d 382. The arbitrators' award (App. 45a-53a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 2008. A petition for rehearing en banc was denied on January 12, 2009. *See* App. 33a-34a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, are set forth in the Appendix (at 71a-73a).

STATEMENT

This case presents the question whether the Federal Arbitration Act permits the imposition of class-action procedures on a private commercial arbitration where the parties' agreement to arbitrate is silent regarding class arbitration. The Court has previously granted review to resolve that precise question, but has been unable to reach it because of threshold issues. *See Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444, 447 (2003) (plurality opinion); *see also Southland Corp.* v. *Keating*, 465 U.S. 1, 3, 8-9 (1984). There are no such threshold issues here.

1. "[T]he central purpose of the Federal Arbitration Act [is] to ensure that private agreements to arbitrate are enforced according to their terms." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (internal quotation marks omitted). Courts and arbitrators thus may not reform arbitration agree-

ments, but must "'rigorously enforce'" them as written, thereby giving "effect to the contractual rights and expectations of the parties." *Volt. Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (quoting *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985)). Because "[a]rbitration under the Act is a matter of consent, not coercion," *Mastrobuono*, 514 U.S. at 57, a party cannot be forced to arbitrate to an extent greater than provided for in its contract. Thus, Section 4 of the FAA authorizes courts to compel parties to arbitrate, but only "in accordance with the terms of the[ir] agreement." 9 U.S.C. § 4.

The statutory mandate to enforce parties' arbitration agreements strictly as written applies even when doing so may reduce some of the usual advantages of arbitration, such as "simplicity, informality, and expedition." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Indeed, a court or arbitration panel may not alter the terms of an arbitration clause even if it believes those terms will yield inefficient or cumbersome results, such as multiple proceedings. On the contrary, the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983).

2. In *Green Tree Financial Corp.* v. *Bazzle*, this Court granted certiorari to decide whether the FAA precluded the South Carolina Supreme Court from holding that class arbitration can be imposed on parties whose arbitration clause is silent as to such arbitration. As the South Carolina court explained, that issue had divided the lower courts. *See Bazzle* v. *Green Tree Fin. Corp.*, 569 S.E.2d 349, 356-358 (S.C. 2002), *vacated on other grounds*, 539 U.S. 444 (2003). This Court did not reach the issue, however, because a plurality concluded

that the parties' arbitrator, rather than the state courts, should have made the initial determination whether the parties' contracts were "in fact silent" regarding class arbitration, or whether they "forb[ade] class arbitration" by their terms, as the petitioner contended. 539 U.S. at 447, 453-454. Justice Stevens would have reached the merits and affirmed, but acquiesced in vacating and remanding in order to produce a judgment for the Court. *Id.* at 454-455 (Stevens, J., concurring in the judgment and dissenting in part). Chief Justice Rehnquist and Justices O'Connor and Kennedy also would have reached the merits, but would have held that the FAA does not permit class arbitration where the parties' "contracts do not by their terms permit" it. *Id.* at 455 (Rehnquist, C.J., dissenting). Justice Thomas did not reach the merits because he adhered to his previously expressed view that the FAA does not apply to proceedings in state courts. *Id.* at 460 (Thomas, J., dissenting).

3. Petitioners and respondent Animalfeeds International Corp. are parties to international maritime contracts under which petitioners agreed to transport Animalfeeds' cargo between non-U.S. ports. App. 2a. The contracts were made on the "Vegoilvoy" charter party, a standard industry form in common use since 1950. App. 5a & n.3, 67a-69a. The form calls for the settlement of disputes through arbitration, to be held in New York and "conducted in conformity with the provisions and procedure of the United States Arbitration Act." App. 5a.[1]

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[1] The Vegoilvoy arbitration clause states in relevant part: "Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and

In 2003, Animalfeeds filed an action against petitioners and other international ocean carriers in federal district court, alleging that the defendants had engaged in a global price-fixing conspiracy. App. 3a. In related litigation, the Second Circuit held that such claims fell within the scope of the parties' agreement to arbitrate. App. 3a & n.1 (citing *JLM Indus., Inc.* v. *Stolt-Nielsen SA*, 387 F.3d 163, 183 (2d Cir. 2004)). Animalfeeds then sought to arbitrate its claims against petitioners—not just on its own behalf, but on behalf of a putative class of buyers of ocean-transportation services, namely chemical companies around the world. *See* App. 36a. The class potentially involves thousands of different shipping contracts, covering transportation of hundreds of different specialty liquids between scores of ports in dozens of countries. Petitioners opposed Animalfeeds' class-arbitration demand on the ground that they had never consented to class arbitration. *Id.*

After this Court's decision in *Bazzle*, the parties here, seeking to conform their arbitration proceedings to the *Bazzle* plurality's opinion, reached a supplemental agreement to govern certain aspects of their arbitration. *See* App. 55a-66a. Pursuant to that agreement,

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Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act, and a judgment of the Court shall be entered upon any award made by said arbitrator." App. 69a. The United States Arbitration Act was the popular name prescribed by Congress in 1925 when it enacted the precursors to the provisions now commonly known as the FAA. *See* Act of Feb. 12, 1925, ch. 213, § 14, 43 Stat. 883, 886.

a three-arbitrator panel was selected and initially tasked with construing the parties' arbitration clause on the question of class arbitration. App. 3a-4a (quoting Rule 3 of the Supplementary Rules for Class Arbitrations of the American Arbitration Association).[2] On that question, the parties agreed that the Vegoilvoy clause was "silent" on the question of class arbitration. App. 49a.

In the face of that silence, petitioners cited federal case law prohibiting class or other consolidated arbitration without all parties' consent. *See* App. 6a, 50a. They also pointed out that the maritime arbitration clauses at issue had never been the basis for a class arbitration. And they provided, as subsequently noted by the arbitrators, undisputed "declarations and testimony from two experts ... to the effect that sophisticated, multinational commercial parties of the type that are sought to be included in the class would never intend that the arbitration clauses would permit a class arbitration." App. 51a. Animalfeeds, on the other hand, relying principally on awards from a number of consumer arbitrations, in which other arbitrators had decided to permit class proceedings under "silent" clauses, argued that "public policy favored class arbitration." App. 6a, 49a-50a. The arbitrators accepted Animalfeeds' position, ruling that the Vegoilvoy clause would permit class arbitration in light of its silence on that issue. App. 7a-8a, 52a.

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[2] The parties' supplemental agreement provides that "neither the fact of this Agreement nor any of its terms may be used to support or oppose any argument in favor of a class action arbitration ... and may not be relied upon by the [p]arties, any arbitration panel, any court, or any other tribunal for such purposes." App 62a-63a.

4. Rule 3 of the AAA class arbitration rules, incorporated by the parties' post-*Bazzle* supplemental agreement, requires a stay of proceedings to allow a party to seek confirmation or vacatur of an award permitting or prohibiting class proceedings. App. 4a & n.2. By adopting this procedure, both parties reserved the right to challenge the legal correctness of the arbitrators' ruling on this threshold issue. Petitioners accordingly petitioned the United States District Court for the Southern District of New York to vacate the panel's partial award.[3]

The district court vacated the award, holding that the arbitrators had failed to apply clear principles of federal maritime law that preclude class arbitration absent specific consent by all parties. *See* App. 38a-41a. The court did not reach petitioners' argument that the FAA does not permit imposition of class arbitration on parties whose contract is silent on that question. *See* App. 44a n.4; *accord* App. 27a-28a.

5. The Second Circuit reversed. App. 1a-32a. The court first discussed at some length the legal standards for vacating an arbitral award based on "manifest disregard" of the law. *See* App. 10a-19a. Applying those standards, it concluded that, although it "might well find [the district court's] analysis persuasive" as an original matter, "the errors it identified" in the arbitra-

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[3] The district court had subject-matter jurisdiction under: (i) 9 U.S.C. § 203, because the underlying arbitration is not entirely between U.S. citizens and hence falls under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards; (ii) 28 U.S.C. § 1333, because the arbitration involves claims arising from a maritime contract; and (iii) 28 U.S.C. § 1331, because the arbitration demand asserts claims under the Sherman Act, 15 U.S.C. § 1.

tors' award did not "rise to the level of manifest disregard of the law." App. 21a; *see also* App. 19a-31a.

The court of appeals next addressed and rejected petitioners' argument, not reached by the district court, that the FAA "prohibit[s] class arbitration unless expressly provided for in an arbitration agreement." App. 28a. The court of appeals recognized that pre-*Bazzle* decisions from the Second and Seventh Circuits were "grounded in federal arbitration law to the effect that the FAA itself did not permit consolidation, joint hearings, or class representation absent express provisions for such proceedings in the relevant arbitration clause." App. 29a. The court held, however, that *Bazzle* "abrogated those decisions to the extent that they read the FAA to prohibit such proceedings." *Id.* (citing Justice Stevens' opinion in *Bazzle*, concurring in the judgment and dissenting in part); *see also* App. 4a n.2. Based on that determination, the court rejected petitioners' contention that, in light of those decisions, the arbitrators here had either disregarded the law or otherwise "'exceeded their powers'" under the FAA. App. 31a (quoting 9 U.S.C. § 10(a)(4)).

REASONS FOR GRANTING THE PETITION

This Court granted certiorari in *Bazzle* to resolve whether the FAA allows class arbitration to be imposed on parties whose arbitration clause is silent on that point. That issue continues to divide the lower courts. Misinterpretations of *Bazzle* by several courts, including the Second Circuit in this case, have exacerbated the uncertainty and confusion caused by the conflict of authority. This case, which is free of the threshold issues that have previously thwarted review, is a good vehicle for resolving this important question.

I. THE LOWER COURTS REMAIN DIVIDED OVER THE QUESTION THIS COURT WAS UNABLE TO REACH IN *BAZZLE*

A. The Pre-*Bazzle* Conflict

As the South Carolina Supreme Court recognized in *Bazzle*, state and lower federal courts "have taken two different approaches" in deciding whether class arbitration is permitted when the parties' agreement is silent on that point. 569 S.E.2d at 356; *see also* Pet. for Cert. 14-23, *Bazzle*, No. 02-634 (Oct. 23, 2002), *available at* 2002 WL 32101094.

1. Several courts construed the FAA to prohibit class arbitration when the agreement is silent

In *Champ* v. *Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), the Seventh Circuit held that "the FAA forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter," *id.* at 275. Rejecting the argument that class arbitration "would not contradict the terms of an agreement that is silent on the issue," *id.* at 274, the court observed that "to read [class arbitration] into the parties' agreement would disrupt the negotiated risk/benefit allocation and direct the parties to proceed with a different sort of arbitration" than they agreed to, *id.* at 275 (other brackets and internal quotation marks omitted). The court likewise was unpersuaded by the contention that forbidding class arbitration might cause "various inefficiencies and inequities," *id.* at 277, explaining that "the Supreme Court has repeatedly emphasized that we must rigorously enforce the parties' agreement as they wrote it," *id.*

The court in *Champ* relied on cases from six other circuits that "held that absent an express provision in the parties' arbitration agreement, the duty to rigorously enforce arbitration agreements 'in accordance with the terms thereof' as set forth in section 4 of the FAA bars district courts from ... requir[ing] consolidated arbitration, even where consolidation would promote the expeditious resolution of related claims." *Champ*, 55 F.3d at 274.[4] The Seventh Circuit focused in particular on *Government of United Kingdom* v. *Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993), observing that in that case the Second Circuit analyzed this Court's decisions in *Volt*, *Dean Witter*, and *Moses H. Cone*, and explained that they mandate enforcement of arbitration agreements as written.[5] The Seventh Circuit embraced

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[4] The cases the Seventh Circuit cited, *see* 55 F.3d at 274-275, were *Government of United Kingdom* v. *Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993); *American Centennial Insurance Co.* v. *National Casualty Co.*, 951 F.2d 107, 108 (6th Cir. 1991); *Baesler* v. *Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); *Protective Life Insurance Corp.* v. *Lincoln National Life Insurance Corp.*, 873 F.2d 281, 282 (11th Cir. 1989); *Del E. Webb Construction* v. *Richardson Hospital Authority*, 823 F.2d 145, 150 (5th Cir. 1987), *abrogated on other grounds as stated in Pedcor Management Co. Welfare Benefit Plan* v. *Nations Personnel of Texas, Inc.*, 343 F.3d 355, 363 (5th Cir. 2003); and *Weyerhaeuser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984). As the *Champ* court also noted, *see* 55 F.3d at 275 n.2, a divided panel of the First Circuit had held that consolidation of arbitrations in the face of a silent arbitration clause *is* permissible if applicable state arbitration law authorizes it, *see New England Energy Inc.* v. *Keystone Shipping Co.*, 855 F.2d 1, 3 (1st Cir. 1988).

[5] The Second Circuit later applied *Boeing* to prohibit a court from requiring even a joint hearing of separate arbitrations when such a hearing is not authorized by the relevant arbitration

the reasoning of *Boeing* and the other circuit decisions, seeing "no meaningful basis to distinguish between the failure to provide for consolidated arbitration and class arbitration." *Champ*, 55 F.3d at 275.

Other courts likewise concluded, before *Bazzle*, that class arbitration may not be imposed where the parties' arbitration contract is silent on the issue. For example, in *Med Center Cars, Inc.* v. *Smith*, 727 So. 2d 9 (Ala. 1998), the Alabama Supreme Court followed *Champ* in concluding that "to require class-wide arbitration would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration," *id.* at 20. Similarly, the Eighth Circuit held in *Dominium Austin Partners, L.L.C.* v. *Emerson*, 248 F.3d 720 (8th Cir. 2001), that "because the partnership agreements make no provision for arbitration as a class, the district court did not err by compelling appellants to submit their claims to arbitration as individuals," *id.* at 728-729; *see also Stein* v. *Geonerco, Inc.*, 17 P.3d 1266, 1271 (Wash. Ct. App. 2001) (citing *Champ*); *Johnson* v. *W. Suburban Bank*, 225 F.3d 366, 377 n.4 (3d Cir. 2000) (observing in dicta that class arbitration "appears impossible ... unless the arbitration agreement contemplates such a procedure" (citing *Champ*)).

2. Other courts construed the FAA to permit class arbitration when the agreement is silent

In contrast to the decisions above, other courts held before *Bazzle* that class arbitration may be im-

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clauses. *Glencore, Ltd.* v. *Schnitzer Steel Prods. Co.*, 189 F.3d 264, 266-268 (2d Cir. 1999).

posed when the parties' arbitration clause does not address the issue. The California Supreme Court adopted this rule as a matter of state law in *Keating* v. *Superior Court*, 645 P.2d 1192, 1209-1210 (Cal. 1982), *rev'd on other grounds sub nom. Southland Corp.* v. *Keating*, 465 U.S. 1 (1984).[6] California's intermediate appellate court later rendered a similar ruling as a matter of federal law, holding that the FAA does not "preempt[] California decisional authority authorizing classwide arbitration." *Blue Cross of Cal.* v. *Superior Court*, 78 Cal. Rptr. 2d 779, 781 (Cal. Ct. App. 1998). Similarly, the court in *Dickler* v. *Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991), held that class arbitration is permissible even when the parties' contract does not authorize it, *see id.* at 865-867. Finally, of course, the South Carolina Supreme Court took the same position in *Bazzle*, *see* 569 S.E.2d at 360, although this Court vacated its judgment on other grounds.[7]

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[6] On appeal in *Keating*, this Court held that a California statute invalidating arbitration agreements in certain contracts was preempted by the FAA. *Southland*, 465 U.S. at 3, 10-16. The Court was unable to reach a second question presented—"whether arbitration under the federal Act is impaired when a class-action structure is imposed on the process by the state courts," *id.* at 3—because that question was not pressed or passed upon as a federal issue in the state courts. *Id.* at 8-9, 17.

[7] Several of these cases involved adhesion contracts, which are often claimed to be products of disparities in bargaining power. Whatever the merits of those claims, they are irrelevant in this case, which involves sophisticated international commercial parties on both sides and arbitration language from a decades-old standard industry contract that was not drafted by petitioners. Indeed, when the Second Circuit held in a prior related appeal that the claims against petitioners were subject to arbitration, it rejected the argument that a similar arbitration clause in a similar

B. The Conflict Persists After *Bazzle*

This Court's judgment and opinions in *Bazzle* did not resolve the question on which the Court had granted review—whether the FAA permits the imposition of class arbitration on parties whose arbitration clause is silent on that issue, or whether instead the Act requires affirmative evidence of intent to permit class arbitration. The conflict originally at issue in *Bazzle* thus persists. Indeed, the opinions in *Bazzle* have generated error and confusion in their own right, underscoring the need for the Court to grant certiorari again to resolve this important issue.

Some courts have misread *Bazzle* as having resolved the pre-*Bazzle* conflict in favor of permitting the imposition of class arbitration even when the parties' agreement is silent on the issue. That is the Second Circuit's holding in this case. App. 29a. The Illinois Supreme Court has likewise stated flatly that "the United States Supreme Court held in [*Bazzle*] that class actions may be arbitrated when the agreement between the parties is silent on the question." *Kinkel* v. *Cingular Wireless LLC*, 857 N.E.2d 250, 262 (Ill. 2006). And the Ninth Circuit, citing *Kinkel*, has read *Bazzle* as "an implicit endorsement by a majority of the Court of class arbitration procedures as consistent with the Federal Arbitration Act." *Shroyer* v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 992 (9th Cir. 2007); *see also id.* ("[T]he Supreme Court has recog-

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standard shipping contract was "an unconscionable or oppressive term of adhesion." *JLM Indus.*, 387 F.3d at 170 n.5; *see also id.* (noting that plaintiff, an international shipper similar to Animalfeeds, was "a large and sophisticated commercial enterprise that was familiar with and well understood the [contract]'s terms").

nized the arbitrability of class claims under the [FAA] in *Bazzle*." (internal quotation marks omitted)).

Other courts have correctly rejected that reading of *Bazzle*, leaving intact their pre-*Bazzle* substantive rule prohibiting class arbitration in the face of a silent agreement. The Seventh Circuit, for example, has concluded that the decision in *Bazzle* has no precedential force. *See Employers Ins. Co. of Wausau* v. *Century Indem. Co.*, 443 F.3d 573, 580 (7th Cir. 2006) ("[W]e cannot identify a single rationale endorsed by a majority of the Court [in *Bazzle*]. ... The Justices' rationales do not overlap."). Thus, if this case had originated in the Seventh Circuit, the governing construction of the FAA would still have been the pre-*Bazzle* rule from *Champ* that class arbitration cannot be imposed unless the parties' contract provides for it, and the arbitrators' award here would have been vacated. The *Champ* rule also remains the law in the other jurisdictions that had embraced it before *Bazzle*, because the courts there, like the Seventh Circuit, have not misread *Bazzle* to have changed that rule. On the other hand, courts that followed the contrary rule—allowing the imposition of class procedures based on a silent contract—before *Bazzle* will presumably continue to follow it now. In the Second Circuit, meanwhile, the rule has now flipped from one side of the conflict to the other, based solely on a misreading of the precedential effect of the plurality opinion and partial concurrence in *Bazzle*. Finally, in some instances state and federal courts in the same jurisdiction are applying the FAA differently: If this case had originated in an Illinois state court, that court would have been bound by *Kinkel*, while a federal district court in Illinois would be bound by the contrary holding in *Champ*.

Bazzle has thus perpetuated a conflict in legal authority and, indeed, generated further misunderstanding, uncertainty, and confusion on an important and recurring issue of federal arbitration law, one that this Court has already deemed worthy of review.[8]

II. THE COURT SHOULD GRANT REVIEW IN THIS CASE TO SETTLE WHETHER THE FAA PERMITS IMPOSITION OF CLASS ARBITRATION WHERE THE PARTIES' ARBITRATION CLAUSE IS SILENT

The Court should grant review in this case to resolve the question it could not reach in *Bazzle*, and thereby bring clarity and uniformity to the law. The case provides a good vehicle for resolution of that important question, and review is warranted both to resolve the conflict and because the Second Circuit's decision betrays the FAA's fundamental promise that parties' arbitration agreements will be enforced "in accordance with the terms thereof." 9 U.S.C. § 4.

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[8] Several circuits have misread *Bazzle* in another respect. These courts, though recognizing that *Bazzle* did not reach the question presented, have perceived a clear holding "that arbitrators are supposed to decide whether an arbitration agreement forbids or allows class arbitration." *Pedcor Mgmt.*, 343 F.3d at 359; *see also Certain Underwriters at Lloyd's London* v. *Westchester Fire Ins. Co.*, 489 F.3d 580, 585-587 & n.2 (3d Cir. 2007) (finding a "common denominator ... implicitly run[ning] through the reasoning of the five Justices who support[ed] the judgment in" *Bazzle* (omission in original) (internal quotation marks omitted)). These courts have thus transformed the *Bazzle* plurality's narrow conclusion—that arbitrators must resolve whether the text of an arbitration clause forbids class arbitration or is simply "silent" on the subject, *see* 539 U.S. at 447, 453—into a broad holding that commits to arbitrators not only the textual interpretation of a contract but also the legal question that *Bazzle* did not reach: What substantive rule, if any, governs when the contract is silent?

A. This Case Is A Good Vehicle For Review

In *Bazzle*, this Court was unable to reach the question presented because a plurality concluded that there was a threshold contractual dispute between the parties about whether their arbitration clause was "in fact silent" on the question of class arbitration, or whether instead the text of the contract itself precluded class proceedings. 539 U.S. at 447, 453. Another impediment to consideration by the full Court was Justice Thomas's conclusion that the FAA "does not apply to proceedings in state courts." *Id.* at 460 (Thomas, J., dissenting). In an earlier case presenting a substantially similar question, meanwhile, the Court was unable to reach the issue because the case arose from the state courts and the imposition of class arbitration had not been challenged on FAA grounds in the state proceedings. *Southland*, 465 U.S. at 3, 8-9.

This case involves none of these obstacles to review. Unlike in *Bazzle*, here the parties and the arbitrators have all agreed that the applicable arbitration clause is silent as to class arbitration. *See* App. 49a. The case arises from the federal courts, and the arbitration agreement provides expressly that arbitration is to be "conducted in conformity with the provisions and procedure of the United States Arbitration Act." App. 5a. Finally, the question whether the FAA, as applied in *Champ*, *Boeing*, and other cases, permits imposing class arbitration where the arbitration clause is silent was both pressed and passed upon below. *E.g.*, App. 27a-31a. This case presents that question cleanly for resolution by this Court.

B. The Second Circuit's Decision Conflicts With Core FAA Principles Repeatedly Recognized By This Court

The Second Circuit's decision that class arbitration may be imposed on parties whose arbitration contract does not provide for it cannot be reconciled with this Court's FAA precedents, which demonstrate that involuntary class arbitration is fundamentally inconsistent with the FAA's emphasis on enforcing parties' agreements as written. As this Court has recognized, "[a]rbitration under the [FAA] is a matter of consent, not coercion." *Volt*, 489 U.S. at 479. Indeed, "[t]he central purpose" of the FAA is "to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono*, 514 U.S. at 53-54 (quoting *Volt*, 489 U.S. at 479). Moreover, this Court has made clear that efficiency concerns provide no basis for going beyond the parties' actual agreement regarding arbitration of their disputes. *See Moses H. Cone*, 460 U.S. at 20 (holding that the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement" even where there are "other persons who are parties to the underlying dispute but not to the arbitration agreement").

The Second Circuit's decision here cannot be squared with this clear emphasis on the primacy of consent under the FAA. Petitioners in this case separately agreed to arbitrate with Animalfeeds any dispute that arose from "the making, performance or termination of this Charter Party." App. 5a. Each petitioner also agreed to arbitrate—before mutually selected arbitrators—disputes with other parties that might arise under other contracts. No petitioner, however, ever consented to be drawn into or bound by any class arbitration joining multiple claimants and multiple

respondents, as parties to multiple contracts, in one proceeding before one arbitral panel.[9]

Nor can consent to class arbitration be inferred simply from a party's agreement to a general arbitration clause that is silent on that issue. That is because class arbitration is a fundamentally "different animal than individual arbitration." *Dickler*, 596 A.2d at 866. Most obviously, it operates on an entirely different scale. Just one of the two class-certification orders in *Bazzle*, for example, increased the number of claimants nearly a thousand-fold. *See* 569 S.E.2d at 352-353. Involuntary class proceedings, moreover, inevitably deprive the parties of what would normally be their core right to select particular arbitrators to hear and decide particular, individual disputes. *Cf. Lefkovitz* v. *Wagner*, 395 F.3d 773, 780 (7th Cir. 2005) ("Selection of the decision maker by or with the consent of the parties is the cornerstone of the arbitral process."); *see also* n.9, *supra*. Class proceedings also raise several potentially complex and costly substantive and procedural issues unique to the class setting—class definition and certification, notification, selection of counsel and adequacy of class representation, neutral fairness review of the

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[9] After Animalfeeds served separate arbitration demands on each petitioner, all petitioners and Animalfeeds agreed to joint arbitration of this dispute before one panel. *See* App. 55a-56a. As noted, however, see *supra* n.2, that agreement expressly states that it may not be interpreted to support or oppose class arbitration. *See* App. 62a-63a. Notably, the agreement also departs from some aspects of the original arbitration clause relating to necessary qualifications of the arbitrators. *Compare* App. 57a-59a *with* n.1, *supra*. While parties may of course make such modifications to their own agreements on their own behalf, no absent member of the putative class here has ever agreed to vary the terms of the original agreement.

adequacy of settlements, and the extent to which absent class members can either enforce or be bound by a private, informal, putatively contractual adjudication.[10]

In addition, class arbitration dramatically alters the monetary stakes for the defending parties. In *Bazzle*, for example, one class arbitration resulted in statutory damages of $10.9 million and attorney's fees of over $3.6 million, while the other ended with statutory damages of $9.2 million and attorney's fees of over $3 million. *See* 569 S.E.2d at 352-353, 354. A party that was willing to accept the informal procedures, private decisionmakers, often limited decisional explanations, and extremely limited judicial review in exchange for the speed, finality, privacy, and other advantages of arbitrating individual disputes might well not be willing to make anything like the same trade-off when confronted with the prospect of unified adjudication of hundreds or thousands of claims involving millions of dollars in potential liability.

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[10] These issues are different in kind from the sort of routine procedural judgments, such as how to structure the presentation of evidence, that parties may properly be deemed to have committed to arbitrators' discretion simply by agreeing to arbitrate. Indeed, the anomaly of handling class-action issues through private adjudication, particularly without affirmative evidence of agreement by the parties, is well demonstrated by the number of cases in which class "arbitration" has actually required extensive involvement by courts. *See, e.g.*, *Dickler*, 596 A.2d at 866 ("In addition to the need for a trial court to initially certify the class and to insure that notice is provided for, the trial court will probably have to have final review in order to insure that class representatives adequately provide for absent class members." (footnotes omitted) (citing *Keating*, 645 P.2d at 1209)).

Questions asked during the oral argument in *Bazzle* reveal that Members of the Court recognized that the aggregation of claims into a class arbitration fundamentally transforms the stakes of the proceeding. *See* Tr. 29, *Bazzle*, No. 02-634 (Apr. 22, 2003). ("You might not want to put your company's entire future in the hands of one arbitrator."), 47 ("Without judicial review, would [Green Tree] have rolled the dice for $27 million on one arbitrator?"), *available at* 2003 WL 1989562; *see also Bazzle*, 539 U.S. at 459 (Rehnquist, C.J., dissenting) ("[I]t would have been reasonable for petitioner to [choose different arbitrators for different disputes], in order tc avoid concentrating all of the risk of substantial damages awards in thc hands of a single arbitrator."). And, indeed, recent litigation confirms that some potential defendants will reject arbitration altogether if required to arbitrate class claims. *See Shroyer*, 498 F.3d at 986-987 (giving effect to severability provision under which entire arbitration clause became unenforceable when express waiver of any class arbitration was held to be unconscionable).

Furthermore, it is far from certain whether, in exchange for the much greater risks inherent in class arbitration, defendants gain any of the potentially compensating advantages of class litigation. In a judicial class action the defendant—win, lose, or settle—achieves a final result that normally binds essentially the entire class. *See, e.g., Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 (1996). In contrast, it is not immediately clear where an arbitrator, whose authority stems exclusively from the parties' contract, obtains the power to bind class members who do not affirmatively agree to be bound. *Cf. Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 846 (1999) ("[M]andatory class actions aggregating damages claims implicate the

due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party...,' it being 'our deep-rooted historic tradition that everyone should have his own day in court.'" (quoting *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940), and *Martin* v. *Wilks*, 490 U.S. 755, 762 (1989)) (other citations and internal quotation marks omitted)). Thus, the defendant in a class arbitration must bear the substantial additional costs and risks of such a proceeding, but will then no doubt face arguments that it is not entitled to reap the benefits of an opt-out judicial class action.[11]

Because consent to class arbitration cannot plausibly be inferred simply from consent to individual arbitration, it is clear that the arbitrators' decision that the contracts here "permit" class arbitration, App. 52a, though phrased in terms of what the parties "intended," App. 49a, 51a, is in fact based entirely on extra-contractual considerations. That, however, is exactly the sort of fundamental revision of the parties' actual arbitration agreement that the FAA does not permit. Parties may presumably choose to authorize class arbitration, but neither courts nor arbitrators may, on their own judgment or for their own purposes, read such authorization into a contract that all agree simply does not speak to the issue. To compel class arbitration in those circumstances impermissibly gives effect to

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[11] If class arbitration *is* imposed in these circumstances, courts will presumably have to find ways to make the results mutually binding, in order to avoid obvious unfairness to class defendants. The extensive litigation that would no doubt be necessary to reach that result would itself be an improper burden on parties that never consented to class arbitration in the first place.

what particular arbitrators or judges may deem desirable or convenient—rather than to "the contractual rights and expectations of the parties." *Volt*, 489 U.S. at 479.[12]

C. The Question Presented Is Important

Resolution of the question presented by this case is at least as important today as it was at the time of *Bazzle*.[13] Arbitration clauses are in widespread use, including in long-term contracts and in contracts used by parties with both nationwide and international operations. It is essential that there be clear, uniform rules governing basic threshold questions, such as whether a clause that does not speak to class arbitration may nonetheless be "interpreted" to allow it. Conflict and confusion in the law promote inconsistency and unfairness, and "encourage and reward forum shopping." *Southland*, 465 U.S. at 15.

These problems are compounded by the lack of transparency and review that typically inhere in private arbitrations. Indeed, as explained above, *see supra* n.8, since *Bazzle* some courts have committed to

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[12] Inferring consent to class arbitration from a general arbitration clause is particularly inappropriate here. As noted above, *see supra* p.6, substantially identical arbitration clauses have been used for decades in industry-standard forms that have never previously been made the basis for a class arbitration. Moreover, all evidence of maritime industry custom and usage here confirms that no party signing any of the agreements at issue would have expected that it authorized class arbitration. App. 51a; *see also* 2d Cir. App. A647-A650, A857-A860.

[13] The substantial number of amicus briefs filed at the merits stage in *Bazzle* (on both sides) is one indicator of the broad significance of the question. *See* 539 U.S. at 446 n.*.

arbitrators not only the textual question whether a contract is silent regarding class arbitration, but also the legal question whether the FAA permits class arbitration when a contract is silent. That approach means that absent review here, judicial resolution of the legal question may never be available—leaving the conflict in the lower courts permanently unresolved.

The harm from an absence of clarity and uniformity is particularly acute where, as here, many of the parties affected are foreign companies engaged in international transactions. *Cf., e.g., Norfolk S. Ry. Co.* v. *James N. Kirby, Pty Ltd.*, 543 U.S. 14, 28 (2004) ("Here, our touchstone is a concern for the uniform meaning of maritime contracts[.]"). Such parties are entitled to clear and reliable rules for arbitration in U.S. commercial centers such as New York—and to clear notice if significant Second Circuit precedents are to be deemed "abrogated" by fractured decisions of this Court, allowing arbitrators to "construe" industry-standard shipping contracts, in use for decades, to permit wholly unprecedented class arbitrations.[14]

Arbitration can have many advantages, but only if the rules for invoking it are predictable and are applied to implement the actual agreements and expectations of the parties. After *Bazzle*, the law is unclear and unpredictable, with the lower courts in conflict, several misreading *Bazzle*, and parties highly vulnerable to po-

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[14] *See, e.g.*, 2d Cir. App. A648 (petitioners' expert opining that "[n]on-U.S. parties typically have no experience with class actions and would be horrified to learn they could find themselves caught up in a class action case by agreeing to arbitrate in New York, as compared with other leading maritime arbitration centers whose legal systems do not recognize these types of cases").

tentially unreviewable decisions in which arbitrators follow their own policy or procedural preferences rather than faithfully observing the limits of the parties' agreement, as this Court's decisions require them to do. That situation warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-3474-cv

STOLT-NIELSEN SA, STOLT-NIELSEN TRANSPORTATION GROUP LTD., ODFJELL ASA, ODFJELL SEACHEM AS, ODFJELL USA, INC., JO TANKERS BV, JO TANKERS, INC., AND TOKYO MARINE CO. LTD.,
Petitioners-Appellees,

v.

ANIMALFEEDS INTERNATIONAL CORP.,
Respondent-Appellant,

KP CHEMICAL CORP., *Respondent*.*

Argued: May 30, 2008.
Decided: Nov. 4, 2008.

[548 F.3d 85]

* * *

[87]

Before: KEARSE, SACK, and LIVINGSTON, Circuit Judges.

SACK, Circuit Judge:

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* The Clerk of Court is directed to amend the official caption as set forth above.

The parties to this litigation are also parties to international maritime contracts that contain arbitration clauses. The contracts are silent as to whether arbitration is permissible on behalf of a class of contracting parties. The question presented on this appeal is whether the arbitration panel, in issuing a clause construction award construing that silence to permit class arbitration, acted in manifest disregard of the law. The United States District Court for the Southern District of New York (Jed S. Rakoff, Judge) answered that question in the affirmative and therefore vacated the award. We conclude to the contrary that the demanding "manifest disregard" standard has not been met. The judgment of the district court is therefore reversed and the cause remanded with instructions to deny the petition to vacate.

BACKGROUND

Respondent-Appellant AnimalFeeds International Corp. ("AnimalFeeds") alleges that Petitioners-Appellees Stolt-Nielsen SA, Stolt-Nielsen Transportation Group Ltd., Odfjell ASA, Odfjell Seachem AS, Odfjell USA, Inc., Jo Tankers BV, Jo Tankers, Inc., and Tokyo Marine Co. Ltd. (collectively "Stolt-Nielsen") are engaged in a "global conspiracy to restrain competition in the world market for parcel tanker shipping services in violation of federal antitrust laws." Appellant's Br. 4. AnimalFeeds seeks to proceed on behalf of a class of "[a]ll direct purchasers of parcel tanker transportation services globally for bulk liquid chemicals, edible oils, acids, and other specialty liquids from [Stolt-Nielsen] at any time during the period from August 1, 1998, to November 30, 2002." Claimants' Consolidated Demand for Class Arbitration, May 19, 2005, at 4.

AnimalFeeds initially filed suit in the United States District Court for the Eastern District of Pennsylvania on September 4, 2003. That action was transferred to the District of Connecticut pursuant to an order of the Judicial Panel on Multidistrict Litigation, *see* 28 U.S.C. § 1407 (2000), consolidating "actions shar[ing] factual questions relating to the existence, scope and effect of an alleged conspiracy [88] to fix the price of international shipments of liquid chemicals in the United States," *In re Parcel Tanker Shipping Servs. Antitrust Litig.*, 296 F. Supp. 2d 1370, 1371 (J.P.M.L 2003). In the District of Connecticut, Stolt-Nielsen moved to compel arbitration. The district court denied the motion but we reversed, holding that the parties' transactions were governed by contracts with enforceable agreements to arbitrate and that the antitrust claims were arbitrable. *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 183 (2d Cir. 2004).[1]

The parties then entered into an agreement stating, among other things, that the arbitrators "shall follow and be bound by Rules 3 through 7 of the American Arbitration Association's Supplementary Rules for Class Arbitrations (as effective Oct. 8, 2003)." Agreement Regarding New York Arbitration Procedures for Putative Class Action Plaintiffs in Parcel Tanker Services Antitrust Matter ("Class Arbitration Agreement") 3.

Rule 3 provides:

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[1] AnimalFeeds was not a named party in *JLM Industries*, which reversed a decision that had been entered by the District of Connecticut prior to *In re Parcel Tanker Shipping Services Antitrust Litigation*'s transfer and consolidation order. It is undisputed, however, that our decision in *JLM Industries* had the effect of requiring arbitration of AnimalFeeds's claims.

> Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award"). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. . . .
>
> In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.[2]

American Arbitration Ass'n, Supplementary Rules for Class Arbitrations (2003) ("Supplementary Rules"), *available at* http://www.adr.org/sp.asp?id=21936 (last visited October 17, 2008). Pursuant to the Class Arbitration Agreement, AnimalFeeds, together with several co-plaintiffs not parties to this appeal, filed a demand for class arbitration. An arbitration panel was appointed to decide the Clause Construction Award.

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[2] The Supplementary Rules were issued following the Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003), which held that when parties agree to arbitrate, the question of whether the agreement permits class arbitration is one of contract interpretation to be determined by the arbitrators, not by a court.

The arbitration panel was required to consider the arbitration clauses in two standard-form agreements known as the Vegoilvoy charter party and the Asbatankvoy charter party.[3] The Vegoilvoy [89] agreement, which governs all transactions between Animal-Feeds and Stolt-Nielsen relevant to this appeal, contains the following broadly worded arbitration clause:

> Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act, and a judgment of the Court shall be entered upon any award made by said arbitrator. Nothing in this clause shall be deemed to waive Owner's right to lien on the cargo for freight, dead freight or demurrage.

The Asbatankvoy agreement, which governs some relevant transactions between Stolt-Nielsen and other putative class members not parties to this appeal, con-

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[3] "A charter party is a specific contract, by which the owners of a vessel let the entire vessel, or some principal part thereof, to another person, to be used by the latter in transportation for his own account, either under their charge or his." *Asoma Corp. v. SK Shipping Co.*, 467 F.3d 817, 823 (2d Cir. 2006) (citations and internal quotation marks omitted); *see also* 2 Thomas J. Schoenbaum, Admiralty & Maritime Law § 11-1, at 2 (4th ed. 2004) ("The charter party is . . . a specialized form of contract for the hire of an entire ship, specified by name." (footnote omitted)).

tains a similar broadly worded arbitration clause.[4] Both agreements unambiguously mandate arbitration but are silent as to whether arbitration may proceed on behalf of a class.

The arbitration panel, tasked with deciding whether that silence permitted or precluded class arbitration, received evidence and briefing from both sides. AnimalFeeds and its co-plaintiffs argued that because the arbitration clauses were silent, arbitration on behalf of a class could proceed. They cited published clause construction awards under Rule 3 of the Supplementary Rules permitting class arbitration awards where the arbitration clause was silent. They also argued that public policy favored class arbitration and that the contracts' arbitration clauses would be unconscionable and unenforceable if they forbade class arbitration.

Stolt-Nielsen's position was that because the arbitration clauses were silent, the parties intended not to permit class arbitration. It cited several federal cases and arbitration decisions denying consolidation and class treatment of claims where the arbitration clause was silent. Stolt-Nielsen also argued that arbitration decisions cited by AnimalFeeds were inapposite because they were not made in the context of international maritime agreements, where parties have no expectation that arbitration will proceed on behalf of a class. In addition, Stolt-Nielsen offered extrinsic evidence regarding "the negotiating history and the context" of the arbitration agreements to "reinforce the conclusion that the parties did not intend . . . to authorize class arbitration." Re-

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[4] The Asbatankvoy arbitration clause is reproduced in the district court's opinion. *See Stolt-Nielsen SA v. Animalfeeds Int'l Corp.*, 435 F. Supp. 2d 382, 384 n.1 (S.D.N.Y. 2006).

spondents' Opposition to Claimants' Motion for Clause Construction Award Permitting Class Arbitration ("Stolt-Nielsen's Arbitration Br.") 16. At oral argument before the arbitration panel, Stolt-Nielsen acknowledged that the interpretation of the contracts at issue here was a question of first impression.

On December 20, 2005, the arbitration panel issued a Clause Construction Award deciding that the agreements permit class arbitration.[5] The panel based its decision largely on the fact that in all twenty-one **[90]** published clause construction awards issued under Rule 3 of the Supplementary Rules, the arbitrators had interpreted silent arbitration clauses to permit class arbitration. The panel acknowledged that none of those cases was decided in the context of an international maritime contract. It said that it was nonetheless persuaded to follow those clause construction awards because the contract language in the cited cases was similar to the language used in the charter parties, the arbitrators in those cases had rejected contract-interpretation arguments similar to the ones made by Stolt-Nielsen in this case, and Stolt-Nielsen had been unable to cite any arbitration decision under Rule 3 in which contractual silence had been construed to prohibit class arbitration.

In addition, the panel distinguished Second Circuit case law prohibiting consolidation of claims when an arbitration agreement is silent, *see, e.g.*, *United Kingdom v. Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993), reasoning that "consolidation of two distinct arbitrations

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[5] The panel did not certify a class or otherwise decide whether the arbitration would actually proceed as a class action. The panel's decision was limited to deciding a question of contract interpretation: whether the arbitration agreements permit class arbitration.

under two distinct arbitration clauses raises a different situation from a class action." Clause Construction Award 6.

Lastly, the panel acknowledged that the arbitration clauses under consideration "are part of a long tradition of maritime arbitration peculiar to the international shipping industry." *Id.* It concluded nonetheless that Stolt-Nielsen's arguments regarding the negotiating history and context of the agreements did not establish that the parties intended to preclude class arbitration.

Stolt-Nielsen petitioned the district court to vacate the Clause Construction Award. The court granted the petition, concluding that the award was made in manifest disregard of the law. *Stolt-Nielsen SA v. Animalfeeds Int'l Corp.*, 435 F. Supp. 2d 382, 387 (S.D.N.Y. 2006). According to the district court, the arbitrators "failed to make any meaningful choice-of-law analysis." *Id.* at 385. They therefore failed to recognize that the dispute was governed by federal maritime law, that federal maritime law requires that the interpretation of charter parties be dictated by custom and usage, and that Stolt-Nielsen had demonstrated that maritime arbitration clauses are never subject to class arbitration. *Id.* at 385-86. Even under state law, the district court said, the panel was required to interpret contracts in light of industry custom and practice. *Id.* at 386. Because these clearly established rules of law were presented to the panel and the panel failed to apply them, the district court held, the Clause Construction Award must be, and was, vacated. *Id.* at 387.

AnimalFeeds appeals.

DISCUSSION

I. STANDARD OF REVIEW

We review *de novo* a district court's order vacating an arbitration award for manifest disregard of the law. *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 69 (2d Cir. 2003).

II. GROUNDS FOR VACATING AN ARBITRATION AWARD

"It is well established that courts must grant an arbitration panel's decision great deference." *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 388 (2d Cir. 2003). The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* (2006), allows vacatur of an arbitral award:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;

[91]

> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id. § 10(a).[6] We have also recognized that the district court may vacate an arbitral award that exhibits a "manifest disregard" of the law. *Duferco*, 333 F.3d at 388 (citing *Goldman v. Architectural Iron. Co.*, 306 F.3d 1214, 1216 (2d Cir. 2002)); *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 208 (2d Cir. 2002). We do not, however, "recognize manifest disregard of the evidence as proper ground for vacating an arbitrator's award." *Wallace v. Buttar*, 378 F.3d 182, 193 (2d Cir. 2004) (citation and internal quotation marks omitted; emphasis added).

III. STOLT-NIELSEN'S "MANIFEST DISREGARD" CLAIM

A. Legal Standards

The party seeking to vacate an award on the basis of the arbitrator's alleged "manifest disregard" of the law bears a "heavy burden." *GMS Group, LLC v. Benderson*, 326 F.3d 75, 81 (2d Cir. 2003). "Our review under the [judicially constructed] doctrine of manifest disregard is 'severely limited.'" *Duferco*, 333 F.3d at 389 (quoting *India v. Cargill Inc.*, 867 F.2d 130, 133 (2d Cir. 1989)). "It is highly deferential to the arbitral award and obtaining judicial relief for arbitrators' manifest disregard of the law is rare." *Id.*[7] The "mani-

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[6] Section 11 of the FAA, moreover, enumerates various circumstances in which the district court may "modify[] or correct[]" an arbitration award. 9 U.S.C. § 11.

[7] The *Duferco* court made this point in quantitative terms, noting that between "1960 [and the 2003 *Duferco* decision] we have vacated some part or all of an arbitral award for manifest disregard in . . . four out of at least 48 cases where we applied the standard." *Duferco*, 333 F.3d at 389 (collecting cases). The fact that a finding of manifest disregard is "exceedingly rare," *id.*, does not, of course, mean that this appeal does not provide us with just such a

fest disregard" doctrine allows a reviewing court to vacate an arbitral award only in "those exceedingly rare instances where some egregious impro-[92]priety on the part of the arbitrators is apparent." *Id.*

Vacatur of an arbitral award is unusual for good reason: The parties agreed to submit their dispute to arbitration, more likely than not to enhance efficiency, to reduce costs, or to maintain control over who would settle their disputes and how—or some combination thereof. *See Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133, 138-39 (2d Cir. 2007); *Willemijn Houdstermaatschappij, BV v. Standard Micro-*

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case. But to update the observation made by the *Duferco* court, since *Duferco*, we have vacated one award, and remanded two others for clarification. *See Rich v. Spartis*, 516 F.3d 75 (2d Cir. 2008); *Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133 (2d Cir. 2007); *Hardy v. Walsh Manning Sec., L.L.C.*, 341 F.3d 126 (2d Cir. 2003). We count fifteen instances during the same period in which we have declined to do either. *See Parnell v. Tremont Capital Mgmt. Corp.*, 280 F. App'x 76 (2d Cir. 2008) (summary order); *Metlife Sec., Inc. v. Bedford*, 254 F. App'x 77 (2d Cir. 2007) (summary order); *Appel Corp. v. Katz*, 217 F. App'x 3 (2d Cir. 2007) (summary order); *Nicholls v. Brookdale Univ. Hosp. & Med. Ctr.*, 204 F. App'x 40 (2d Cir. 2006) (summary order); *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95 (2d Cir. 2006); *IMC Mar. Group, Inc. v. Russian Farm Cmty. Project*, 167 F. App'x 845 (2d Cir. 2006) (summary order); *Nutrition 21, Inc. v. Wertheim*, 150 F. App'x 108 (2d Cir. 2005) (summary order); *Bear, Stearns & Co. v. 1109580 Ontario, Inc.*, 409 F.3d 87 (2d Cir. 2005); *Stone & Webster, Inc. v. Triplefine Int'l Corp.*, 118 F. App'x 546 (2d Cir. 2004) (summary order); *Tobjy v. Citicorp/Inv. Servs.*, 111 F. App'x 640 (2d Cir. 2004) (summary order); *Wallace v. Buttar*, 378 F.3d 182 (2d Cir. 2004); *IBAR Ltd. v. Am. Bureau of Shipping*, 92 F. App'x 820 (2d Cir. 2004) (summary order); *Carpenter v. Potter*, 91 F. App'x 705 (2d Cir. 2003) (summary order); *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255 (2d Cir. 2003); *Hoeft v. MVL Group, Inc.*, 343 F.3d 57 (2d Cir. 2003).

systems Corp., 103 F.3d 9, 12 (2d Cir. 1997); *see also* Note, *Judicial Review of Arbitration Awards on the Merits*, 63 Harv. L. Rev. 681, 681-82 (1950). "To interfere with this process would frustrate the intent of the parties, and thwart the usefulness of arbitration, making it 'the commencement, not the end, of litigation.'" *Duferco*, 333 F.3d at 389 (quoting *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349 (1854)). It would fail to "maintain arbitration's essential virtue of resolving disputes straightaway." *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1405 (2008).

In this light, "manifest disregard" has been interpreted "clearly [to] mean[] more than error or misunderstanding with respect to the law." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986). "We are not at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it." *Id.* at 934.

> A federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law. On the contrary, the award should be enforced, despite a court's disagreement with it on the merits, if there is a *barely colorable justification* for the outcome reached.

Wallace, 378 F.3d at 190 (2d Cir. 2004) (citation and internal quotation marks omitted; emphasis added in *Wallace*).

In the context of contract interpretation, we are required to confirm arbitration awards despite "serious reservations about the soundness of the arbitrator's reading of th[e] contract." *Westerbeke Corp.*, 304 F.3d at 216 n.10 (2d Cir. 2002). "Whether the arbitrators

misconstrued a contract is not open to judicial review." *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 n.4 (1956). "Whatever arbitrators' mistakes of law may be corrected, simple misinterpretations of contracts do not appear one of them." *I/S Stavborg v. Nat'l Metal Converters, Inc.*, 500 F.2d 424, 432 (2d Cir. 1974).

The concept of "manifest disregard" is well illustrated by *New York Telephone Co. v. Communications Workers of America Local 1100*, 256 F.3d 89 (2d Cir. 2001) (per curiam). There the arbitrator recognized binding Second Circuit case law but deliberately refused to apply it, saying—no doubt to the astonishment of the parties—"'Perhaps it is time for a new court decision.'" *Id.* at 91. Because the arbitrator explicitly rejected controlling precedent, we concluded that the arbitral decision was rendered in manifest disregard of the law. *Id.* at 93.

"The manifest disregard doctrine is not confined to that rare case in which the arbitrator provides us with explicit acknowledgment of wrongful conduct, however." *Westerbeke*, 304 F.3d at 218 (citing *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998) ("[W]e doubt whether even under a strict construction of the meaning of manifest disregard, it is necessary for arbitrators to state that they are deliberately ignoring the law."), *cert. denied*, 526 U.S. 1034 (1999)). If the arbitrator's [93] decision "strains credulity" or "does not rise to the standard of barely colorable," *id.* (citations, internal quotation marks, and brackets omitted), a court may conclude that the arbitrator "willfully flouted the governing law by refusing to apply it," *id.* at 217.

There are three components to our application of the "manifest disregard" standard.

First, we must consider whether the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators. An arbitrator obviously cannot be said to disregard a law that is unclear or not clearly applicable. Thus, misapplication of an ambiguous law does not constitute manifest disregard.

Second, once it is determined that the law is clear and plainly applicable, we must find that the law was in fact improperly applied, leading to an erroneous outcome. We will, of course, not vacate an arbitral award for an erroneous application of the law if a proper application of law would have yielded the same result. In the same vein, where an arbitral award contains more than one plausible reading, manifest disregard cannot be found if at least one of the readings yields a legally correct justification for the outcome. Even where explanation for an award is deficient or non-existent, we will confirm it if a justifiable ground for the decision can be inferred from the facts of the case.

Third, once the first two inquiries are satisfied, we look to a subjective element, that is, the knowledge actually possessed by the arbitrators. In order to intentionally disregard the law, the arbitrator must have known of its existence, and its applicability to the problem before him. In determining an arbitrator's awareness of the law, we impute only knowledge of governing law identified by the parties to the arbitration. Absent this, we will infer knowledge and intentionality on the part of the arbitrator only if we find an error that is so obvious that it would be instantly perceived as such by

> the average person qualified to serve as an arbitrator.

Duferco, 333 F.3d at 389-90 (citations omitted).

B. The Effect of *Hall Street* on the "Manifest Disregard" Doctrine

We pause to consider whether a recent Supreme Court decision, *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), affects the scope or vitality of the "manifest disregard" doctrine. *See* Thomas E.L. Dewey & Kara Siegel, *Room for Error: 'Hall Street' and the Shrinking Scope of Judicial Review of Arbitral Awards*, N.Y.L.J., May 15, 2008, at 24 (commenting that *Hall Street* "appeared to question the validity" of the manifest disregard doctrine).

There, the parties had entered into an arbitration agreement that, unlike the FAA, provided for a federal court's *de novo* review of the arbitrator's conclusions of law. *Hall Street*, 128 S. Ct. at 1400-01. The Court rejected the parties' attempt to contract around the FAA for expanded judicial review of arbitration awards, concluding that the grounds for vacatur of an arbitration award set forth in the FAA, 9 U.S.C. § 10, are "exclusive." *Hall Street*, 128 S. Ct. at 1401, 1403. Although the "manifest disregard" doctrine was not itself at issue, the *Hall Street* Court nonetheless commented on its origins:

> The *Wilko* Court . . . remarked (citing FAA § 10) that "[p]ower to vacate an [arbitration] award is limited," and went on to say that "the interpretations of the **[94]** law by the arbitrators in contrast to manifest disregard [of the law] are not subject, in the federal courts, to judicial review for error in interpretation."

Hall Street, 128 S. Ct. at 1403 (quoting *Wilko*, 346 U.S. at 436-37) (citations omitted) (second, third, and fourth alterations in *Hall Street*).

> Maybe the term "manifest disregard" was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. Or, as some courts have thought, "manifest disregard" may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers."

Id. at 1404 (citations omitted). The Court declined to resolve that question explicitly, noting instead that it had never indicated, in *Wilko* or elsewhere, that "manifest disregard" was an independent basis for vacatur outside the grounds provided in section 10 of the FAA. *See id.*

In the short time since *Hall Street* was decided, courts have begun to grapple with its implications for the "manifest disregard" doctrine. Some have concluded or suggested that the doctrine simply does not survive. *See Ramos-Santiago v. United Parcel Service*, 524 F.3d 120, 124 n.3 (1st Cir. 2008) (dicta); *Robert Lewis Rosen Assocs., Ltd. v. Webb*, 566 F. Supp. 2d 228, 233 (S.D.N.Y. 2008); *Prime Therapeutics LLC v. Omnicare, Inc.*, 555 F. Supp. 2d 993, 999 (D. Minn. 2008); *Hereford v. D.R. Horton, Inc.*, -- So. 2d --, No. 1070396, 2008 WL 4097594, *5, 2008 Ala. LEXIS 186, *12-*13 (Ala. Sept. 5, 2008). Others think that "manifest disregard," reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA, remains a valid ground for vacating arbitration awards. *See MasTec N. Am., Inc. v. MSE Power Sys., Inc.*, No. 1:08-cv-168, 2008 WL 2704912, at *3, 2008 U.S. Dist. LEXIS 52205, at *8-9

(N.D.N.Y. July 8, 2008); *Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d 342, 349 (Sup. Ct. N.Y. County 2008).

We agree with those courts that take the latter approach. The *Hall Street* Court held that the FAA sets forth the "exclusive" grounds for vacating an arbitration award. *Hall Street*, 128 S. Ct. at 1403. That holding is undeniably inconsistent with some dicta by this Court treating the "manifest disregard" standard as a ground for vacatur entirely separate from those enumerated in the FAA. *See, e.g., Hoeft*, 343 F.3d at 64 (describing manifest disregard as "an additional ground not prescribed in the [FAA]"); *Duferco*, 333 F.3d at 389 (observing that the doctrine's use is limited to instances "where none of the provisions of the FAA apply"); *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d Cir. 1997) (referring to the doctrine as "judicially-created"), *cert. denied*, 522 U.S. 1049 (1998); *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 808 F.2d at 933 (same).[8] But the Hall Street Court also speculated that "the term 'manifest **[95]** disregard' . . . merely referred to the § 10 grounds collectively, rather than adding to them"—or as "shorthand for § 10(a)(3) or § 10(a)(4)." *Hall Street*, 128

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[8] *But see I/S Stavborg*, 500 F.2d at 431 (2d Cir. 1974) ("But perhaps the rubric 'manifest disregard' is after all not to be given independent significance; rather it is to be interpreted only in the context of the specific narrow provisions of 9 U.S.C. §§ 10 & 11 . . . ." (footnote omitted)); *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir.) ("It is true that an award may be vacated where the arbitrators have 'exceeded their powers.' 9 U.S.C. § 10(d). Apparently relying upon this phrase, the Supreme Court in *Wilko v. Swan* suggested that an award may be vacated if in 'manifest disregard' of the law."), *cert. denied*, 363 U.S. 843 (1960) (internal citation omitted).

S. Ct. at 1404. It did not, we think, abrogate the "manifest disregard" doctrine altogether.[9]

We agree with the Seventh Circuit's view expressed before *Hall Street* was decided:

> It is tempting to think that courts are engaged in judicial review of arbitration awards under the Federal Arbitration Act, but they are not. When parties agree to arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting arbitration award he perforce does so not on the ground that the arbitrators made a mistake but that they violated the agreement to arbitrate, as by corruption, evident partiality, exceeding their powers, etc.—conduct to which the parties did not consent when they included an arbitration clause in their contract. That is why in the typical arbitration . . . the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all, for only then were they exceeding the authority granted to them by the contract's arbitration clause.

Wise v. Wachovia Sec., LLC, 450 F.3d 265, 269 (7th Cir.) (citations omitted), *cert. denied*, 127 S. Ct. 582 (2006).

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[9] *Cf. State Employees Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 84, 86 (2d Cir. 2007) (adhering to Circuit precedent despite the Supreme Court having "cryptically cast doubt" on prior holdings, noting that "[w]e are bound by our own precedent unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court *en banc*" (citation and internal quotation marks omitted)).

This observation is entirely consistent with *Hall Street*. And it reinforces our own pre-*Hall Street* statements that our review for manifest disregard is "severely limited," "highly deferential," and confined to "those exceedingly rare instances" of "egregious impropriety on the part of the arbitrators." *Duferco*, 333 F.3d at 389.

Like the Seventh Circuit, we view the "manifest disregard" doctrine, and the FAA itself, as a mechanism to enforce the parties' agreements to arbitrate rather than as judicial review of the arbitrators' decision. We must therefore continue to bear the responsibility to vacate arbitration awards in the rare instances in which "the arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it." *Westerbeke*, 304 F.3d at 217. At that point the arbitrators have "failed to interpret the contract at all," *Wise*, 450 F.3d at 269, for parties do not agree in advance to submit to arbitration that is carried out in manifest disregard of the law. Put another way, the arbitrators have thereby "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).

C. Analysis of Stolt-Nielsen's "Manifest Disregard" Claim

If we were of the view that *Hall Street*, decided after the district court granted the petition in this case, eliminated "manifest disregard" review altogether, our inquiry would be at an end. We would be required to send this matter back to the district court for it to dismiss the petition on that ground. But in light of our conclusion that the "manifest disregard" doctrine survives *Hall Street*, we must instead de-**[96]**cide whether

the district court's finding of "manifest disregard" was correct.[10]

1. Review of the District Court's Opinion

According to the district court, the arbitration panel went astray when it "failed to make any meaningful choice-of-law analysis." *Stolt-Nielsen*, 435 F. Supp. 2d at 385.

> In actuality, the choice of law rules in this situation are well established and clear cut. Because the arbitration clauses here in issue are part of maritime contracts, they are controlled in the first instance by federal maritime law.

Id. Because the arbitrators failed to recognize that the dispute was governed by federal maritime law, the district court reasoned, they ignored the "established rule of maritime law" that the interpretation of contracts "is . . . dictated by custom and usage." *Id.* at 385-86. Even under state law, the arbitral panel was required to interpret contracts in light of "industry custom and practice." *Id.* at 386 (citation and internal quotation marks omitted). The district court concluded that, had the arbitration panel followed these well-established canons,

> the [p]anel would necessarily have found for Stolt, since, as the [p]anel itself noted, Stolt presented uncontested evidence that the

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[10] We undertake this task cognizant of the fact that the district court did not have the benefit of the *Hall Street* decision and its requirement that courts adhere scrupulously to a narrow, FAA-tethered view of their authority to vacate arbitration awards based on manifest disregard of the law.

> clauses here in question had *never* been the subject of class action arbitration.

Id. (emphasis in original).

Had the district court been charged with reviewing the arbitration panel's decision *de novo*, we might well find its analysis persuasive. *See Westerbeke*, 304 F.3d at 216 n.10. But the errors it identified do not, in our view, rise to the level of manifest disregard of the law.

a. Choice of Law

First, the arbitral panel did not "manifestly disregard" the law in engaging in its choice-of-law analysis. *See Stolt-Nielsen*, 435 F. Supp. 2d at 385-86.

The "manifest disregard" standard requires that the arbitrators be "fully aware of the existence of a clearly defined governing legal principle, but refuse[] to apply it, in effect, ignoring it." *Duferco*, 333 F.3d at 389. "In determining an arbitrator's awareness of the law, we impute only knowledge of governing law identified by the parties to the arbitration." *Id.* at 390.

Stolt-Nielsen's brief to the arbitration panel referred to choice-of-law principles in a single footnote without citing supporting case law. It then assured the panel that the issue was immaterial:

> Claimants argue that the law of New York governs these contracts . . . . We believe, to the contrary, that because these are federal maritime contracts, federal maritime law should govern. The Tribunal need not decide this issue, however, because the analysis is the same under either.

Stolt-Nielsen's Arbitration Br. 7 n.13. This concession bars us from concluding that the panel manifestly dis-

regarded the law by not engaging in a choice-of-law analysis and expressly identifying federal maritime law as governing the interpretation of the charter party language.[11]

We are not convinced that the arbitral panel, in any event, "failed to make [97] any meaningful choice-of-law analysis." Even where an arbitrator's explanation for an award is deficient, we must confirm it if a justifiable ground for the decision can be inferred from the record. *See Bear, Stearns & Co. v. 1109580 Ontario, Inc.*, 409 F.3d 87, 91 (2d Cir. 2005); *Duferco*, 333 F.3d at 390; *see also Wallace*, 378 F.3d at 190 (2d Cir. 2004) ("[A] court reviewing an arbitral award cannot presume that the arbitrator is capable of understanding and applying legal principles with the sophistication of a highly skilled attorney."). The first paragraph of the arbitrators' discussion of the law states that they "must look to the language of the parties' agreement to ascertain the parties' intention whether they intended to permit or to preclude class action. This is . . . consistent with New York law . . . and with federal maritime law." Clause Construction Award 4. Although the panel did not use the term "choice of law," it is a plausible reading of the award decision that the panel intended to interpret the charter parties according to the rules of both New York State law and federal maritime law—each of which, the panel thought, would render the same result.[12] That is what Stolt-Nielsen had asked it to do.

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[11] Had the arbitrators looked to the charter parties themselves for a choice-of-law provision, as of course they may have, they would have found none. *See Stolt-Nielsen*, 435 F. Supp. 2d at 385 n. 2.

[12] We find it instructive that under New York choice-of-law principles,

b. Federal Maritime Rule of Construction

Second, the arbitration panel did not manifestly disregard the law with respect to an established "rule" of federal maritime law. *See Stolt-Nielsen*, 435 F. Supp. 2d at 386.

Although the district court's opinion states that the interpretation of maritime contracts "is very much dictated by custom and usage," *id.* at 385-86, custom and usage is more of a guide than a rule, *see Great Circle Lines, Ltd. v. Matheson & Co.*, 681 F.2d 121, 125 (2d Cir. 1982) ("Certain long-standing customs of the shipping industry are crucial factors to be considered when deciding whether there has been a meeting of the minds on a maritime contract."); *Schoonmaker-Conners Co. v. Lambert Transp. Co.*, 269 F. 583, 585 (2d Cir. 1920) ("While maritime contracts or their interpretation are probably more subject to the influence of usage or general custom than most other agreements, yet they are and a charter is a contract like another, subject to the same general rules and leading to the same liabilities."); *Samsun Corp. v. Khozestan Mashine Kar Co.*, 926 F. Supp. 436, 439 (S.D.N.Y. 1996)

> the first question to resolve in determining whether to undertake a choice of law analysis is whether there is an actual conflict of laws. It is only when it can be said that there is no actual conflict that New York will dispense with a choice of law analysis.

Fieger v. Pitney Bowes Credit Corp., 251 F.3d 386, 393 (2d Cir. 2001) (citations and internal quotation marks omitted). Another plausible reading of the arbitration award, then, is that the panel concluded there was no need to make a "choice of law" between federal maritime law and New York law because there was no actual conflict of laws in the case before it.

("[E]stablished practices and customs of the shipping industry inform the court's analysis of what the parties agreed to.").[13] Thus, although the custom and usage rule is "clear and plainly applicable" as a general matter in disputes over the meaning of charter parties, *Duferco*, 333 F.3d at 390, it should "be considered," "influence" in-[98]terpretation, and "inform the court's analysis." It does not govern the outcome of each case.

Indeed, Stolt-Nielsen cites no decision holding that a federal maritime rule of construction specifically precludes class arbitration where a charter party's arbitration clause is silent. *Cf. Bazzle v. Green Tree Fin. Corp.* ("*Bazzle I*"), 569 S.E.2d 349, 360 (S.C. 2002) (holding as a matter of state law that "class-wide arbitration may be ordered when the arbitration agreement is silent"), *vacated on other grounds*, 539 U.S. 444 (2003). To the contrary, during oral argument before the arbitration panel, counsel for Stolt-Nielsen conceded that the interpretation of the charter parties in this case was an issue of first impression.

Stolt-Nielsen's challenge to the Clause Construction Award therefore boils down to an argument that the arbitration panel misinterpreted the arbitration clauses before it because the panel misapplied the "custom and usage" rule. But we have identified an arbitrator's interpretation of a contract's terms as an area we are particularly loath to disturb. *See Westerbeke*, 304

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[13] According to Stolt-Nielsen's submission to the arbitration panel, "both New York state law and federal maritime law *allow* a court or arbitrator to examine the negotiating history and the context in which the contract was executed in order to ascertain the parties' intent." Stolt-Nielsen's Arbitration Br. 15 (emphasis added).

F.3d at 214 ("The arbitrator's factual findings and contractual interpretation are not subject to judicial challenge, particularly on our limited review of whether the arbitrator manifestly disregarded the law."); *id.* at 222 (holding that "vacatur for manifest disregard of a commercial contract is appropriate only if the arbitral award contradicts an *express* and *unambiguous* term of the contract or if the award so far departs from the terms of the agreement that it is not even arguably derived from the contract" (emphases added)); *John T. Brady & Co. v. Form-Eze Sys., Inc.*, 623 F.2d 261, 264 (2d Cir.) ("This court has generally refused to second guess an arbitrator's resolution of a contract dispute."), *cert. denied*, 449 U.S. 1062 (1980).

As for whether the panel misapplied the "custom and usage" rule, we have held that "the misapplication . . . of . . . rules of contract interpretation does not rise to the stature of a 'manifest disregard' of law." *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir.), *cert. denied*, 363 U.S. 843 (1960). And determinations of custom and usage are findings of fact, *Mentor Ins. Co. (U.K.) v. Brannkasse*, 996 F.2d 506, 513 (2d Cir. 1993), which federal courts may not review even for manifest disregard, *Wallace*, 378 F.3d at 193.

The arbitration panel, after summarizing Stolt-Nielsen's argument with respect to custom and usage, "acknowledge[d] the forcefulness with which [it was] presented," but concluded that it failed to "establish that the parties to the charter agreements intended to preclude class arbitration." Clause Construction Award 7. The panel thus considered Stolt-Nielsen's arguments and found them unpersuasive. Its conclusion does not "contradict[] an express and unambiguous term of the contract or . . . so far depart[] from the terms of the

agreement that it is not even arguably derived from the contract." *Westerbeke*, 304 F.3d at 222. It therefore did not evidence manifest disregard of the law.

c. State Law

Third, the arbitration panel did not manifestly disregard New York State law. *See Stolt-Nielsen*, 435 F. Supp. 2d at 387.

The district court noted that New York State law, much like federal maritime law, requires courts to interpret ambiguous contracts by reference to "industry custom and practice," *id.* (citation and internal quotation marks omitted); it takes a **[99]** "narrow view of what can be read into a contract by implication," *id.* at 387. The district court concluded that to whatever extent state law applied, it would require the arbitration panel to construe the arbitration clauses not to permit arbitration on behalf of a class. *Id.*

We agree with the district court's observation that state law follows a "custom and practice" canon of construction where the terms of a contract are ambiguous. *See Evans v. Famous Music Corp.*, 1 N.Y.3d 452, 459-60, 775 N.Y.S.2d 757, 762, 807 N.E.2d 869, 873 (2004).[14] But it is also state law that the courts'

> role in interpreting a contract is to ascertain the intention of the parties at the time they entered into the contract. If that intent is discernible from the plain meaning of the language of the contract, there is no need to look further.

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[14] *Evans* was cited in AnimalFeeds's arbitration brief, in the Clause Construction Award, and in the district court's opinion. *See Stolt-Nielsen*, 435 F. Supp. 2d at 386.

> This may be so even if the contract is silent on the disputed issue.

Id. at 458. Here, the arbitration panel may have concluded that even though the arbitration clauses are silent on the disputed issue of whether class arbitration is permitted, their silence bespeaks an intent not to preclude class arbitration. That reading, which is at least "colorable," is consistent with *Evans*.

The district court also cited myriad New York cases that take a narrow view of what can be read into a contract or arbitration clause by implication. *See Stolt-Nielsen*, 435 F. Supp. 2d at 386-87. But none of these cases purports to establish a *rule* regarding the interpretation of an arbitration clause that is silent on the issue of class arbitration. Indeed, the cases largely beg the question whether contractual silence means that the parties did not intend to allow class actions or did not intend to bar them. Because no state-law rule of construction clearly governs the question of whether class arbitration is permitted by an arbitration clause that is silent on the subject, the arbitrators' decision construing such silence to permit class arbitration in this case is not in manifest disregard of the law. *See Cheng v. Oxford Health Plans, Inc.*, 45 A.D.3d 356, 357, 846 N.Y.S.2d 16, 17-18 (1st Dep't 2007) (per curiam) (determining arbitration panel did not exhibit manifest disregard of law when it concluded that "defendants could not successfully demonstrate that New York law prohibited class arbitrations").

2. Stolt-Nielsen's *Glencore/Boeing* Argument

The district court did not reach another argument made by Stolt-Nielsen in support of vacating the Clause Construction Award for manifest disregard of

the law. According to Stolt-Nielsen, this court's decisions in *Glencore, Ltd. v. Schnitzer Steel Products*, 189 F.3d 264 (2d Cir. 1999), and *United Kingdom v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993), along with the Seventh Circuit's decision in *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), prohibit class arbitration unless expressly provided for in an arbitration agreement. These cases do lend support to Stolt-Nielsen's underlying argument regarding the correct interpretation of the arbitration clauses at issue. We do not think, however, that they establish law that is so clearly and plainly applicable that we are compelled to conclude that the arbitration panel willfully ignored it, thereby manifestly disregarding the law.

In *Boeing*, the United Kingdom was a party to two distinct contracts with two different parties giving rise to two separate arbitration proceedings. *Boeing*, 998 F.2d at 69. Because the two dis-**[100]**putes arose from a single incident, the district court, on the motion of the United Kingdom, ordered consolidation of the arbitration proceedings even though neither arbitration clause expressly permitted consolidation. *Id.* We reversed, because "a district court cannot order consolidation of arbitration proceedings arising from separate agreements to arbitrate absent the parties' agreement to allow such arbitration." *Id.*

The facts of *Glencore* are similar. The petitioner was involved in two separate arbitration proceedings arising from separate contracts with two different parties. *Glencore*, 189 F.3d at 265-66. The district court in that case refused to consolidate the arbitration proceedings but ordered a joint hearing. *Id.* at 266. Again we reversed, because "*Boeing*'s conclusion that there is no source of authority in either the FAA or the Federal Rules of Civil Procedure for the district court to order

consolidation absent authority granted by the contracts giving rise to the arbitrations applies with equal force to a court's order of joint hearing." *Id.* at 267.

In *Champ*, the Seventh Circuit affirmed a district court's order denying class arbitration where the arbitration agreements were silent on that issue. *Champ*, 55 F.3d at 277. The court relied in large part on our decision in *Boeing* prohibiting consolidation under such circumstances; it "f[ou]nd no meaningful basis to distinguish between the failure to provide for consolidated arbitration and class arbitration." *Id.* at 275.

These decisions are not binding in this case. After they were decided, the Supreme Court ruled in *Green Tree Financial Corp. v. Bazzle* ("*Bazzle II*"), 539 U.S. 444 (2003), that when the parties agree to arbitrate, the question whether the agreement permits class arbitration is generally one of contract interpretation to be determined by the arbitrators, not by the court. *Id.* at 452-53. *Boeing*, *Glencore*, and *Champ* had been grounded in federal arbitration law to the effect that the FAA itself did not permit consolidation, joint hearings, or class representation absent express provisions for such proceedings in the relevant arbitration clause. *See Glencore*, 189 F.3d at 267; *Champ*, 55 F.3d at 275; *Boeing*, 998 F.2d at 71. *Bazzle II* abrogated those decisions to the extent that they read the FAA to prohibit such proceedings. *See Bazzle II*, 539 U.S. at 454-55 (Stevens, J., concurring) ("[t]here is nothing in the Federal Arbitration Act that precludes . . . the Supreme Court of South Carolina" from determining "as a matter of state law that class-action arbitrations are permissible if not prohibited by the applicable arbitration agreement"). After *Bazzle II*, arbitrators must approach such questions as issues of contract interpretation to be decided under the relevant substantive

contract law. *See id.* at 450 (noting that state law normally governs contract interpretation).

Boeing, *Glencore*, and *Champ* are instructive insofar as they view the silence of an arbitration clause regarding consolidation, joint hearings, and class arbitration as disclosing the parties' intent not to permit such proceedings. *See Glencore*, 189 F.3d at 267 ("There is nothing in the terms of the agreements before the district court that provided for joint hearing."); *Champ*, 55 F.3d at 275 ("The parties' arbitration agreement makes no mention of class arbitration."); *Boeing*, 998 F.2d at 74 ("If contracting parties wish to have all disputes that arise from the same factual situation arbitrated in a single proceeding, they can simply provide for consolidated arbitration in the arbitration clauses to which they are **[101]** a party."). But they do not represent a governing rule of contract interpretation under federal maritime law or the law of New York. And it is the governing rules of contract interpretation that arbitrators must consult according to *Bazzle II*.

As noted, Stolt-Nielsen has cited no federal maritime law or New York State law establishing a rule of construction prohibiting class arbitration where the arbitration clause is silent on that issue.[15] The arbitration

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[15] Nor is *Champ* adhered to in every jurisdiction. *See* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 67-69 & n.260 (2000) (noting that state courts in California and Pennsylvania have allowed class arbitration "even though the arbitration clause is silent"); *see also Keating v. Superior Court*, 31 Cal.3d 584, 613, 183 Cal. Rptr. 360, 378, 645 P.2d 1192, 1210 (1982), *rev'd on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Dickler v. Shearson Lehman Hutton, Inc.*, 408 Pa. Super. 286, 296, 596 A.2d 860, 864-65 (Super. Ct. 1991).

panel's decision to construe the contract language at issue here to permit class arbitration was therefore not in manifest disregard of the law.

IV. Stolt-Nielsen's Claim That the Arbitrators Exceeded Their Authority

In addition to asserting that the arbitration panel acted in manifest disregard of the law, Stolt-Nielsen contends that the arbitration panel "exceeded its authority." Appellees' Br. 18. Although the district court did not reach this claim, it was preserved for appeal.[16]

The FAA provides for vacatur of arbitration awards "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). We may disregard, in this instance, the post-*Hall Street* view that arbitrators may "exceed their powers" when they manifestly disregard the law; we have rejected Stolt-Nielsen's "manifest disregard" claim. The remainder of "[o]ur inquiry under § 10(a)(4) . . . focuses on whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue." *DiRussa*, 121 F.3d at 824; *see also Hoeft*, 343 F.3d at 71; *Westerbeke*, 304 F.3d at 219-20.

Here, the arbitration panel clearly had the power to *reach* the issue of whether the Vegoilvoy agreement permitted class arbitration. The parties expressly

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[16] We perceive no need to remand for the district court to consider this claim in the first instance, as it has been briefed, entails no findings of fact, and is a pure question of law we review *de novo*. *See Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 482 (1977); *United States v. Canfield*, 212 F.3d 713, 721 (2d Cir. 2000).

agreed that the arbitration panel "shall follow and be bound by Rules 3 through 7 of the American Arbitration Association's Supplementary Rules for Class Arbitrations," Class Arbitration Agreement 3. Rule 3 of the Supplementary Rules provides that "the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." Because the parties specifically agreed that the arbitration panel would decide whether the arbitration clauses permitted class arbitration, the arbitration panel did not exceed its authority in deciding that issue—irrespective of whether it decided the issue correctly.

[102]

CONCLUSION

For the foregoing reasons, the judgment of the district court is reversed and the cause remanded to the district court with instructions to deny the petition to vacate.[17]

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[17] Because we reverse the district court's "manifest disregard" holding and reject Stolt-Nielsen's claim that the arbitrators exceeded their authority, we need not and do not consider AnimalFeeds's assertion that denial of the petition is required on public policy grounds, *viz.*, that class arbitration is necessary to vindicate important statutory rights under the Sherman Antitrust Act.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-3474-cv
Stamp:
UNITED STATES COURT OF APPEALS
FILED
JAN 12 2009
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

ORDER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of January, two thousand and nine,

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Stolt-Nielsen SA, Stolt-Nielsen Transportation Group Ltd., Odfjell ASA, Odfjell Seachem AS, Odfjell USA, Inc., Jo Tankers BV, Jo Tankers, Inc., and Tokyo Marine Co. Ltd.,

Petitioners-Appellees,

v.

AnimalFeeds International Corp.,

Respondent-Appellant,

KP Chemical Corp.

Respondent.

Appellee Jo Tankers BV, Appellee Jo Tankers, Inc., Appellee Odfjell ASA, et al having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Frank Perez
Frank Perez, Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 06 Civ. 420 (JSR)

STOLT-NIELSEN SA, STOLT-NIELSEN TRANSPORTATION GROUP LTD., ODFJELL ASA, ODFJELL SEACHEM AS, ODFJELL USA, INC., JO TANKERS BV, JO TANKERS, INC., AND TOKYO MARINE CO. LTD.,
Petitioners

v.

ANIMALFEEDS INTERNATIONAL CORP. AND KP CHEMICAL CORP.,
Respondents.

[435 F. Supp. 2d 382]

* * *

[383]

OPINION AND ORDER

Jed S. Rakoff, U.S.D.J.

Animalfeeds International Corp. and KP Chemical Corp. filed federal suits alleging that Stolt-Nielsen SA *et al.* (collectively "Stolt") violated the antitrust laws in ways that caused respondents to overpay for the shipment of various items in parcel tankers owned or operated by Stolt and others. Their suits, along with certain similar actions brought by other plaintiffs, were consolidated for pretrial proceedings and transferred to

the District of Connecticut. Stolt then moved to compel arbitration of the plaintiffs' claims pursuant to the arbitration clauses in the plaintiffs' respective shipping agreements with Stolt. The Court of Appeals held that all claims were arbitrable, and referred the matter to arbitration. *JLM Industries, Inc. v. Stolt-Nielsen S.A.*, 387 F.3d 163 (2d Cir. 2004).

Animalfeeds International Corp. and KP Chemical Corp. then filed a Consolidated Demand for Class Arbitration on May 19, 2005, asserting claims on behalf of themselves and a class consisting of "[a]ll direct purchasers of parcel tanker transportation services globally for bulk liquid chemicals, edible oils, acids, and other specialty liquids from [Stolt] and their coconspirators (the "Class"), at any time during the period from August 1, 1998 to November 30, 2002 (the "Class Period")." Stolt objected, [384] arguing that they never consented to class arbitration.

Each contract here in issue contains one of two standard maritime arbitration clauses, neither of which expressly permits class arbitration.[1] *See Animalfeeds*

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[1] The contracts between Stolt and Animalfeeds International Corp. contain the "Vegoilvoy Clause," which reads as follows: "Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act, and a judgment of the Court shall be entered upon any award made by said arbitrator."

The contracts between Stolt and KP Chemical Corp. contain the "Asbatankvoy Clause," which reads as follows: "Any and all

Int'l Corp. et al. v. Stolt-Nielsen SA et al. Partial Final Clause Construction Award (Dec. 20, 2005) (the "Award"), at 5. The arbitrators—a distinguished panel comprised of Gerald Aksen (Chair), Kenneth R. Feinberg, and William R. Jentes (the "Panel")—nonetheless held that the clauses, though silent, permit class arbitration. *Id.* at 7-8.

Stolt now moves to vacate the Award, arguing that the Panel's decision was made in manifest disregard of the law. *See Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383 (2d Cir. 2003). Given the very broad latitude accorded arbitration awards, the doctrine of "manifest disregard" is to be invoked in exceptional circumstances only. *Id.* at 389. Specifically, to vacate an arbitration award for manifest disregard of the law, the Court must find "both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998). Here, regretfully, the Court is forced to conclude that both these elements have been established.

The Panel begins its discussion in the Award by asserting that "resolution of the foregoing issue [of whether the clauses permit class arbitration] is con-

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differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York or in the City of London whichever place is specified in Part I of this charter pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen. The decision of any two of the three on any point or points shall be final."

trolled by the Supreme Court's decision in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003)." Award at 4. But, even if, as the Panel also suggests, "the parties agree" that *Bazzle* governs the issue, *id.*, that underlying assertion is plainly wrong, and no "agreement" can make it right: for *Bazzle* decided only that the issue was for the arbitrator in the first instance and remanded for that purpose. *Id.* at 454.

As for the related questions that *Bazzle* failed to resolve—whether the Federal Arbitration Act (which provides for federal enforcement of arbitration provisions in contracts involving commerce, as in *Bazzle*, or in maritime contracts, as here, *see* 9 U.S.C. § 2) precludes class actions and preempts state law—the Panel here did not reach them; and since they involve unsettled law they are not before this Court on a claim of "manifest disregard." But what the Court cannot ignore is that the Panel, proceeding on the misassumption that *Bazzle* "controlled" the issue of **[385]** whether the clauses here permitted class actions, *see* Award at 4, failed to make any meaningful choice-of-law analysis but simply made vague and passing reference to its belief that its analysis of *Bazzle* is "consistent with New York law as articulated by the Court of Appeals in *Evans v. Famous Music Corp.*, 1 N.Y.3d 452 (2004) and with federal maritime law." Award at 4.

In actuality, the choice of law rules in this situation are well established and clear cut. Because the arbitration clauses here in issue are part of maritime contracts, they are controlled in the first instance by federal maritime law. As Stolt correctly argued to the Panel, "because these are federal maritime contracts, federal maritime law should govern." Stolt's Arb. Opp. at 7 n. 13. *See I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424 (2d Cir. 1974); *In re Finagrain*

Compagnie Commerciale Agricole et Financiere S.A., 1980 U.S. Dist. LEXIS 9347 (S.D.N.Y. 1980).[2] That law provides that a court sitting in admiralty applies state law unless there is an established federal maritime rule governing the issue in dispute or the court wishes to fashion such a rule. *See Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 316-17 (1955).

Here, Stolt forcefully brought to the attention of the Panel that there was such a rule. As the Panel states:

> Respondents [Stolt] point out, and Claimants [the respondents here] do not dispute, that the two arbitration clauses are part of a long tradition of maritime arbitration peculiar to the international shipping industry. Among other things, the clauses are part of standard contract forms developed by charterers and widely used by them and their brokers for 30 years. According to Respondents, the vast majority of these charter agreements have been entered into by foreign entities, pertaining to shipments between two foreign ports and requiring arbitration to be held outside the U.S. Re-

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[2] None of the contracts has an overall choice of law provision. While the Vegoilvoy Clause states that the "arbitration shall be conducted in conformity with the provisions and procedures of the United States Arbitration Act," there are no such provisions or procedures that expressly deal with class actions, so that, at most, this simply raises the issues not addressed either in *Bazzle* or by the Panel, and therefore not before the Court here. As for the Asbatankvoy Clause, it merely specifies that whatever "laws relating to arbitration" are "in force" in the City of New York will govern, which could include federal, maritime, state or even local city substantive law, or federal or state procedural law.

> spondents further assert, again without dispute from Claimants, that these arbitration clauses have never been the basis of a class action. Moreover, Respondents presented declarations and testimony from two experts in international maritime arbitrations to the effect that sophisticated, multinational commercial parties of the type that are sought to be included in the class would never intend that the arbitration clauses would permit a class arbitration.

Award at 6-7.

The Panel, however, although acknowledging "the forcefulness with which [Stolt] presented this argument," *id.* at 7, found it unpersuasive when weighed against the contract interpretation the Panel believed was mandated by *Bazzle*. *Id.* But if, instead, the Panel had made the choice-of-law analysis that it was mandated to make but chose to ignore, it would have had to recognize that what Stolt presented was tantamount to an established rule of maritime law. For in the maritime area, more than perhaps any other, the interpretation of contracts—and especially charter party agreements—is very much dictated by cus-**[386]**tom and usage. *See, e.g., Orvig's Dampskibselskab Aktieselskab v. Munson S.S. Line*, 16 F.2d 957, 958 (2d Cir. 1927); *Schoonmaker-Conners Co. v. Lambert Transp. Co.*, 269 F. 583, 585 (2d Cir. 1920); *Samsun Corp. v. Khozestan Mashine Kar Co.*, 926 F. Supp. 436, 439 (S.D.N.Y. 1996). Indeed, it could hardly be otherwise, for the international and transient nature of maritime commerce renders the development of binding rules of custom absolutely necessary if the business is not to devolve into chaos.

The Court finds, therefore, that the arbitrators manifestly disregarded a well defined rule of governing maritime law that precluded class arbitration under the clauses here in issue and that their decision to the contrary must therefore be reversed.

It remains to add, moreover, that the result would be the same even if there was no established maritime rule and state law then governed. For, as the parties here agree, the governing law would then be the law of New York. Perhaps implicitly recognizing as much, the Panel noted, as quoted above, that their approach, while in their view dictated by *Bazzle*, "is also consistent with New York law as articulated by the Court of Appeals in *Evans v. Famous Music Corp.*, 1 N.Y.3d 452, 775 N.Y.S.2d 757 (2004) . . . ." Award at 4. But the Panel offered no "jump cite" for this assertion, and on any fair reading of *Evans* its reasoning, if anything, supports Stolt's view of the law, rather than the Panel's.

The issue in *Evans* was whether a standard royalty provision that entitled certain songwriters to half of all net sums "actually received by the [publisher] with respect to such song or musical composition from any other source or right now known or which may hereafter come into existence," *Evans v. Famous Music Corp.*, 1 N.Y.3d 452, 455 (2004), entitled the songwriters to half of certain U.S. tax savings that the publisher obtained as a result of foreign tax credits it received by paying foreign taxes on its foreign income derived from the compositions in question. Finding the contract ambiguous on this issue, the Court of Appeals "turn[ed] to extrinsic evidence," *id.* at 459, and found that "industry custom and practice," as well as the practice of the parties to these contracts over the past "23 to 59 years,"

strongly supported the position of the publisher, *id.* at 459-60. Accordingly, the Court held for the publisher.

If this same approach had been taken here, the Panel would necessarily have found for Stolt, since, as the Panel itself noted, Stolt presented uncontested evidence that the clauses here in question had *never* been the subject of class action arbitration. *See* Award at 6. The inference is irresistible, therefore, that Evans, if it is relevant here at all, is inconsistent with the Panel's conclusion, rather than consistent with it. Because, however, the Panel no more analyzed the specific issues here under New York law than under maritime law, they entirely ignored New York case law far more directly in point.

For example, in *Salvano v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 85 N.Y.2d 173 (1995), "the issue on [the] appeal [was] whether Supreme Court had the authority to order the parties to proceed [to expedited arbitration] absent any provision explicitly authorizing expedited arbitration in the parties' [arbitration] agreement." *Id.* at 177.

> The short answer to that contention is that arbitration agreements are contracts and must be interpreted under the accepted rules of contract law. The [387] court's role is limited to interpretation and enforcement of the terms agreed to by the parties; it does not include the rewriting of their contract and the imposition of additional terms. To read into the [arbitration contract here, via indirect references] a provision authorizing compulsory expedited arbitration would be to fundamentally modify the terms of the parties' contract and force re-

> spondent to arbitrate in a manner contrary to the agreement to which it has assented.

Id. at 182 (citations omitted). Similarly, in *Cullman Ventures, Inc., v. Conk*, 252 A.D.2d 222 (N.Y. App. Div. 1998), the First Department held that "courts may not consolidate arbitrations in contravention of the parties' agreement even if consolidation would ensure a more economical proceeding. . . . A court's failure to give effect to provisions in separate agreements contemplating separate arbitrations is an unauthorized reformation of these contacts." *See also, e.g., World Bus. Ctr., Inc. v. Euro-American Lodging Corp.*, 309 A.D.2d 166, 172 (N.Y. App. Div. 2003); *Wallace Indus. v. Salt City Energy Venture, L.P.*, 233 A.D.2d 543, 545 (N.Y. App. Div. 1996); *Continental Energy Assocs. v. Asea Brown Boveri, Inc.*, 192 A.D.2d 467, 468 (N.Y. App. Div. 1993).

This is consistent, moreover, with New York's historically narrow view of what can be read into a contract by implication. *See generally Nissho Iwai Eur. v. Korea First Bank*, 99 N.Y.2d 115, 122 (2002); *Trustees of Freeholders & Commonalty v. Jessup*, 173 N.Y. 84, 90 (1903); *Fesseha v. TD Waterhouse Investor Servs.*, 193 Misc. 2d 253, 256 (N.Y. Misc. 2002).[3]

Much, if not all, of this was forcefully brought to the Panel's attention by Stolt (albeit more as general principles than as a matter of New York law). *See, e.g.*, Stolt's Arb. Opp. at 8 ("It is a fundamental rule of contract interpretation that when contracts are silent on

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[3] At most, as noted above, the New York courts have occasionally found that silence may, in context, create an ambiguity; but that, as also noted above, simply opens the door to extrinsic evidence, which here strongly supports Stolt's position.

an issue, no agreement has been reached. The failure of a contract to include such a term . . . means that the parties did not intend to include it."); Award at 6-7 (summarizing extrinsic evidence supporting Stolt's position). But the Panel, because it did not make any choice-of-law analysis, failed to recognize how strongly Stolt's position accorded with New York law.

Thus, even if the governing law here is New York law (as opposed to general maritime law), the result would still be that the Panel acted in manifest disregard of the applicable law, and, in so doing, impermissibly "fashion[ed] a new contract under the guise of contract construction." *Slatt v. Slatt*, 64 N.Y.2d 966, 967 (1985).[4] Such manifest disregard of the applicable law compels the Court to vacate the Award.

Accordingly, the Partial Final Clause Construction Award is hereby vacated, and the case is remanded to the Panel for proceedings consistent with this Opinion and Order.

SO ORDERED.

/s/ Jed S. Rakoff
JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
June 26, 2006

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[4] Because of this conclusion, the Court need not reach Stolt's alternative arguments for vacatur.

APPENDIX D

IN THE MATTER OF THE ARBITRATION BETWEEN

ANIMALFEEDS INTERNATIONAL CORP., JLM INDUSTRIES, INC. and KP CHEMICAL CORP., individually and on behalf of all others similarly situated,

Claimants,

and

STOLT-NIELSEN SA, STOLT-NIELSEN TRANSPORTATION GROUP LTD., ODFJELL ASA, ODFJELL SEACHEM AS, ODFJELL USA, INC., JO TANKERS BV, JO TANKERS, USA, INC., AND TOKYO MARINE CO. LTD.,

Respondents.

PARTIAL FINAL CLAUSE CONSTRUCTION AWARD

We, the undersigned Panel of Arbitrators, having been designated in accordance with the Agreement Regarding New York Arbitration Procedures for Putative Class Action Plaintiffs in Parcel Tanker Services Antitrust Matter, dated April 27, 2005 (hereafter "New York Procedures Agreement"), having been duly sworn and having considered the controlling law and the proofs and record made to date in this proceeding, including the parties' oral and written submissions in connection with Claimants' Motion for Clause Construction Award Permitting Class Arbitration, filed September 20, 2005 (hereafter "Clause Construction Motion"), issues this PARTIAL FINAL CLAUSE CONSTRUCTION AWARD pursuant to Rule 3 of the Supplemental Rules for Class Arbitration of the American Arbitration Association (hereafter "AAA Supplemental [2] Rules"), which Paragraph 7 of the

New York Procedures Agreement provides the Panel shall follow and be bound by.

PROCEDURAL BACKGROUND

This consolidated arbitration had its genesis in a series of court actions filed by Claimants and others in United States District Courts in Connecticut, Pennsylvania and Texas during 2003 and 2004. Each of the actions alleged that the plaintiffs in those court proceedings, including Claimants here, had entered into contracts for the shipment of bulk liquid chemicals, edible oils, acids and other specialty liquids in parcel tankers owned or operated by Respondents and others. The actions alleged, *inter alia*, that Respondents and others had conspired to restrain trade regarding those shipments in violation of the Sherman Antitrust Act and other statutes. The court actions were all consolidated for pretrial proceedings by the Judicial Panel on Multidistrict Litigation and transferred to the District of Connecticut.

Respondents then filed motions to compel arbitration of all of Claimants' claims pursuant to the arbitration clauses in each of their respective shipping contracts. These clauses were of two types. The so-called ASBATANKVOY clause provides:

> Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York or in the City of London whichever place is specified in Part I of this charter pursuant to the laws relating to arbitration there in force before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen.

The decision of any two of the three on any point or points shall be final.

The so-called VEGOILVOY clause provides:

[3]

Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York. Owner and Charter each appointing an arbitrator who shall be a merchant broker or individual experienced in the shipping business; the two thus chosen, shall nominate a third arbitrator who shall be an admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedures of the United States Arbitration Act and a judgment of the court shall be entered upon any award made by said arbitrators. Nothing in this clause shall be deemed to waive Owner's right to a lien on the cargo for freight, deadfreight, or demurrage. United States law shall govern this agreement. For disputes involving less than USD 25000, SMA simplified arbitration procedure shall be used.

In *JLM Ind. Inc. v. Stolt-Nielsen S.A.*, 387 F.3d 163 (2d Cir. 2004), the Second Circuit held that all claims were arbitrable, including those alleging horizontal price-fixing in violation of Section 1 of the Sherman Antitrust Act. The Claimants in this proceeding thereupon entered into the New York Procedures Agreement with Respondents and filed their Consolidated Demand for Class Arbitration on May 19, 2005 (hereafter "Demand") initiating this proceeding.

Claimants' Demand essentially adopted and repeated the allegations of their court actions, except that

their claims regarding Respondents' alleged price-fixing and restraint of trade are limited to violations of the Sherman Antitrust Act. Of particular relevance to the issue presently before the Panel, Claimants' Demand seeks to assert claims on behalf of themselves and the following class:

> All direct purchasers of parcel tanker transportation services globally for bulk liquid chemicals, edible oils, acids, and other specialty liquids from the Respondents and their co-conspirators (the "Class"), at any time during the period from August 1, 1998 to November 30, 2002 (the "Class Period"). Excluded from the Class are the Respondents, any subsidiaries or affiliates of the Respondents, and any of the Respondents' co-conspirators, [4] whether or not named as a Respondent in this Arbitration Proceeding.

Following the filing of their Demand, Claimants filed their Clause Construction Motion seeking a Partial Final Award that the two arbitration clauses at issue permit this arbitration to proceed on behalf of a class. Briefs in support of the Clause Construction Motion, in opposition, and in reply were duly filed, and oral argument was held before the Panel on November 1, 2005.

ISSUE PRESENTED

The sole issue presented at this time to the Panel pursuant to Claimants' Clause Construction Motion and Rule 3 of the AAA's Supplemental Rules is whether the ASBATANKVOY and VEGOILVOY agreements permit this arbitration to proceed on behalf of a class. The Panel is not called upon to decide, nor does it de-

cide, whether the arbitration shall hereafter proceed as a class arbitration.

DISCUSSION OF PARTIES' CONTENTIONS

While the parties agree that the resolution of the foregoing issue is controlled by the Supreme Court's decision in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), they differ regarding the rule of interpretation to be gleaned from that decision. Claimants argue that *Bazzle* requires clear language that forbids class arbitration in order to bar a class action. The Panel, however, agrees with Respondents that the test is a more general one—arbitrators must look to the language of the parties' agreement to ascertain the parties' intention whether they intended to permit or to preclude class action. This is also consistent with New York law as articulated by the Court of Appeals in *Evans v. Famous Music Corp.*, 1 N.Y.3D 452, 775 N.Y.S.2d 757 (2004), and with federal maritime law.

[5]

Turning to the language of the two clauses, the parties agree that they are silent on whether they permit or preclude class arbitration, but that the clauses are not ambiguous so as to call for parol evidence. Further, they agree that the construction of the two clauses in the context of international maritime contracts is a matter of first impression, since there has been no prior judicial or arbitral decision on whether they allow or prohibit class actions.

Although agreeing that the issue is one of first impression, Claimants cite to 21 published partial awards that have been issued by other panels pursuant to Rule 3 of the AAA Supplemental Rules since *Bazzle*, all of which have construed a wide variety of clauses in a

wide variety of settings as allowing for class arbitration. Respondents answer that most, if not all, of these other rulings are distinguishable, mainly as consumer cases or contracts of adhesion. The Panel agrees that none of the other partial awards is exactly comparable. Nevertheless, the Panel is struck that Respondents have been unable to cite any post-*Bazzle* panels or arbitrators that construed their clauses as prohibiting a class action. The Panel is especially persuaded by the fact that many of the cited partial awards rely on the same type of broad wording as in the present two clauses; viz., that "any and all differences and disputes of whatsoever nature" and "any dispute arising from the making, performance or termination of this Charter Party" shall be put to arbitration. Then Panel is also impressed by the fact that many of the other panels rejected arguments similar to those advanced by Respondents to the effect that the clauses contemplated non-class treatment because they provide for the selection of a panel consisting of "one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen." *See also Bazzle*, 539 U.S. at 450-51.

[6]

Respondents also seek to counter a construction allowing class arbitration by citing to a number of court cases denying consolidation of arbitrations. *E.g., Government of the United Kingdom v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993). But the Panel agrees with Claimants that consolidation of two distinct arbitrations under two distinct arbitration clauses raises a different situation from a class action, and that there are some cases allowing consolidation in the circumstances before them. *E.g., Vigo S.S. Corp. v. Marship Corp. of Monrovia*, 26 N.Y.2d 157, 309 N.Y.S.2d 165 (1970). More-

over, if the consolidation precedents controlled, there would appear to be no basis for a class action absent express agreement among all parties and the putative class members, which was not present in the over twenty clause construction awards cited by Claimants.

Respondents' final argument is that a correct interpretation of the two clauses must take account of the "context" in which they were developed, used and entered into. Respondents point out, and Claimants do not dispute, that the two arbitration clauses are part of a long tradition of maritime arbitration peculiar to the international shipping industry. Among other things, the clauses are part of standard contract forms developed by charterers and widely used by them and their brokers for 30 years. According to Respondents, the vast majority of these charter agreements have been entered into by foreign entities, pertaining to shipments between two foreign ports and requiring arbitration to be held outside the U.S. Respondents further assert, again without dispute from Claimants, that these arbitration clauses have never been the basis of a class action. Moreover, Respondents presented declarations and testimony from two experts in international maritime arbitrations to the effect that sophisticated, multinational [7] commercial parties of the type that are sought to be included in the class would never intend that the arbitration clauses would permit a class arbitration.

Although the Panel acknowledges the forcefulness with which Respondents presented this argument, it concludes that that they do not establish that the parties to the charter agreements intended to preclude class arbitration, particularly when weighed against the other considerations discussed above. It is the case, too, that maritime and other multinational parties

might not once have contemplated arbitration of antitrust claims under their arbitration clauses, but so U.S. courts have held in the presence of broad clauses like the two here. The Panel also concludes that the concern raised by Respondents—that the bulk of international shippers would never intend to have their disputes decided in a class arbitration—can better be dealt with later in any future class determination phase when Respondents can raise the issue, if a class is certified, whether members of the putative class should be required to "opt in" to this proceeding.

CONCLUSION AND PARTIAL FINAL AWARD

Based on the foregoing, the Panel concludes that the arbitration agreements at issue do permit this consolidated arbitration to proceed on behalf of a class, and we therefore AWARD as follows:

1. Both the ASBATANKVOY and VEGOILVOY arbitration clauses permit this consolidated arbitration to proceed as a class arbitration.

2. Pursuant to Rule 3 of the AAA Supplemental Rules, the Panel retains jurisdiction of this arbitration, but stays all further proceedings for a period of 30 days following the date of this Partial Final Clause Construction Award to permit any party to move in a court of competent jurisdiction to confirm or vacate this Partial [8] Final Award. Each party shall promptly notify the Panel in the event such a motion is filed, failing which the Panel shall move to schedule a conference in connection with the class determination phase of this proceeding.

This Partial Final Award may be executed in any number of counterparts, each of which shall be deemed

an original, and all of which shall constitute together one and the same instrument.

Dated: New York, New York
December 20, 2005

/s/ Kenneth R. Feinberg
Kenneth R. Feinberg, Esq.
Arbitrator

/s/ William R. Jentes
William R. Jentes, Esq.
Arbitrator

/s/ Gerald Aksen, Esq.
Gerald Aksen, Esq.
Arbitrator

APPENDIX E

AGREEMENT REGARDING NEW YORK ARBITRATION PROCEDURES FOR PUTATIVE CLASS ACTION PLAINTIFFS IN PARCEL TANKER SERVICES ANTITRUST MATTER

1. The undersigned (through counsel) chemical companies ("Class Plaintiffs") (which at the time of parties' original agreement, includes Animalfeeds International Corp. and related entities, JLM Industries, Inc., KP Chemical Corp., Nizhnekamskneftekhim USA, Inc., and Tulstar Products, Inc.) have alleged that some or all of the undersigned (through counsel) parcel tanker shipping companies ("Defendants") (which at the time of the parties' original agreement, includes the Stolt-Nielsen defendants, Odfjell defendants, JO Tankers defendants, and/or Tokyo Marine defendants, as specified below) have conspired to engage in anti-competitive conduct that resulted in their paying higher rates for parcel tanker shipping services. Class Plaintiffs each seek to assert claims on behalf of a class of similarly situated entities. The aforementioned parties (the "Parties") seek to avoid duplicative discovery and other related inefficiencies in connection with New York arbitrations of such claims.

2. Any other plaintiff seeking a class action that asserts antitrust and/or related claims that are properly pursued in a New York arbitration, arising out of its purchase of parcel tanker shipping services from one or more of the Defendants during the relevant period, may join these consolidated proceedings with the consent of all Class Plaintiffs and all Defendants.

3. Within twenty (20) days after the execution of this Agreement by all of the aforementioned Parties (the

"the Execution Date"), Class Plaintiffs shall serve a consolidated arbitration demand relating to all such claims as described in Paragraph 1 arising out of any contract of affreightment, spot contract, charter party or other form of agreement ("Charter Party Agreement) that provides for arbitration in New York City. Nothing in this Agreement shall affect any rights the Class Plaintiffs may have to include in their consolidated arbitration demand claims arising out of any charter Party Agreements that do not provide for arbitration in New York City, or any rights the Class Plaintiffs may have to assert that such claims should be arbitrated in New York City as part of the proceedings contemplated herein. Nor does anything in this Agreement affect any rights the Defendants may have to oppose the inclusion of such claims in the Class Plaintiffs' consolidated arbitration demand, or to oppose any assertions by the Class Plaintiffs that such claims should be arbitrated in New York City as part of the proceedings contemplated herein.

4. In connection with the consolidated proceedings agreed to herein, Class Plaintiffs shall at the time they serve their consolidated arbitration demand jointly designate a single arbitrator to serve on a three person arbitration panel that will sit in New York City (the "Panel") for the purpose of hearing and resolving class issues and dealing with prehearing discovery relating to all such claims as described in paragraph 1, to the extent such claims are properly pursued in a New York arbitration (see the Parties' reservation of rights in Paragraph 3). Within twenty (20) business days after the appointment of the first arbitrator, the Defendants shall jointly designate a second arbitrator to serve on the Panel.

[2]

5. The Class Plaintiffs and the Defendants shall select for the Panel neutral and unbiased arbitrators who (a) believe and represent that they can perform their duties impartially and independently from the Parties, the Parties' counsel, potential witnesses, and other arbitrators; and (b) have no known existing direct or indirect financial interests in the outcome of the arbitration proceedings. Additionally, such arbitrators for the previous five years may not have (a) had a financial interest in any of the Parties (other than incidental stock or bond ownership); (b) been employed by any of the Parties; (c) represented any of the Parties; or (d) practiced law with any of the lawyers of law firms currently representing any of the Parties. At the time of designation, the designating Parties shall serve on the other Parties the arbitrator's written representation that he or she meets each of these qualifications; the arbitrator's resume; a list of all arbitrations in which the arbitrator was retained to act as an arbitrator, identifying the parties and the attorneys (noting which ones designated the arbitrator); a list of all publications authored by the arbitrator within the previous five years; and a list of all cases in which the arbitrator participated as an attorney within the past five years in which the arbitrator represented a chemical company, a ship owner, or that involved an antitrust claim based on alleged price-fixing, bid rigging or customer allocation (identifying the parties and which of such parties was represented by the arbitrator). After accepting appointment and while serving as an arbitrator, the arbitrator shall avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create an appearance of parti-

ality. In the event that an arbitrator selected by the Class Plaintiffs or the Defendants is no longer able to serve on the Panel, the same Parties that selected that arbitrator shall within twenty (20) days select a replacement pursuant to these same procedures.

6. The two arbitrators named by the Parties for the Panel shall choose a third arbitrator within twenty (20) days of their own designation. They shall select a third arbitrator who is neutral and unbiased; has no financial interest in any of the Parties; has not been employed by any of the Parties; has not represented any of the Parties; has not practiced law with any of the lawyers or law firms that currently represent those Parties; and who in all other respects, both they and he or she believe can address whatever issues may arise among the Parties in a neutral and unbiased manner. At the time of the designation, the Panel shall serve on the Parties the third arbitrator's written representation that he or she meets each of these qualifications; the arbitrator's resume; a list of all arbitrations in which the arbitrator was retained to act as an arbitrator, identifying the parties and the attorneys (noting which ones designated the arbitrator); a list of all publications authored by the arbitrator; and a list of all cases in which the arbitrator participated as an attorney within the past five years in which the arbitrator represented a chemical company, a ship owner, or that involved allegations of antitrust violations, identifying the parties and which of them was represented by the arbitrator. After accepting appointment and while serving as an arbitrator, the third arbitrator shall avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create an appearance of partiality. In the event the two arbitrators

cannot agree on a third arbitrator, either arbitrator may apply to a Judge of any court of maritime jurisdiction in New York City, as provided in the ASBATANKVOY charter party form. In the event that the third arbitrator, chosen by the two arbitrators named by [3] the Parties, is no longer able to serve on the Panel, the two arbitrators named by the Parties shall choose a replacement pursuant to these same procedures.

7. The Parties agree that the Panel shall follow and be bound by Rules 3 through 7 of the American Arbitration Association's Supplementary Rules for Class Arbitrations (as effective Oct. 8, 2003). The proceedings, however, shall not be administered by the AAA.

8. The decision of any two of the three arbitrators of the Panel shall be the final decision of the Panel.

9. Within ten (10) business days following the selection of a third arbitrator to the Panel, the Parties shall meet and confer concerning a proposed schedule. Although the Parties will confer further on such scheduling and procedural matters, they do agree that hearings on scheduling and/or discovery matters shall be conducted telephonically to the extent feasible to avoid waste of private and arbitral resources. Within ten (10) business days following that meeting, the Parties shall submit their joint proposal to the Panel. If the Parties fail to reach agreement, they shall submit their respective proposed schedules to the Panel within ten (10) business days after the date on which their joint proposal was otherwise due. The Parties reserve all rights to make or oppose any arguments concerning the timing of any class discovery and the determination of class issues, the timing of any merits discovery, and any relationship between these issues—e.g., whether mer-

its discovery should be stayed or should proceed simultaneously with the determination of class issues.

10. In the event the Panel certifies a class, the same Panel will proceed to address liability to the class with respect to such claims as described in Paragraph 1, to the extent such claims arise out of Charter Party Agreements that provide for arbitration in New York City or to the extent the Parties are otherwise required to arbitrate such claims in these New York City proceedings (see the Parties' reservation of rights in Paragraph 3), as well as the Defendants' counterclaims.

11. In the event that the Panel certifies a class and returns a finding of liability on the Class Plaintiffs' claims and/or the Defendants' counterclaims, the Panel shall determine what procedures are appropriate for addressing damages, after receiving and considering the Parties' respective positions on such damages procedures. The Parties reserve their rights to make or oppose any arguments with regard to such damages procedures. Among other things, the Class Plaintiffs reserve the right to argue that the Panel should determine damages to the class based on an appropriate classwide damages formula. Among other things, the Defendants reserve the right to argue that the damages of each particular class member should be determined separately either by the Panel or by separate panels. To the extent that any other panels are convened for this purpose, they shall be selected by the Parties pursuant to the procedures set forth above in paragraphs 4, 5 and 6.

12. In the event the Panel denies class certification, if discovery has not been completed, the Panel shall continue to coordinate any remaining discovery concerning the Class Plaintiffs' claims as described in Paragraph 1,

to the extent such claims arise out of Charter Party Agreements that provide for arbitration in New York City or to the extent the Parties are otherwise required to arbitrate such claims in these New York City proceedings (see the Parties' [4] reservation of rights in Paragraph 3), as well as the Defendants' counterclaims. After the arbitral ruling denying class certification or at the conclusion of discovery, whichever is later, the Parties shall confer about the procedures to be used to address the merits of each individual Class Plintiff's claims, including whether such claims should be heard on a consolidated basis by the Panel or on a separate basis, either by the Panel or by a separate panel for each individual Class Plaintiff. The Parties reserve all rights and arguments with respect to such issues, including all rights to see or to oppose any type of consolidation beyond the express terms of this Agreement. To the extent that the Parties are required to participate in a consolidated arbitration of the merits of each individual Class Plaintiff's claims, absent agreement to the contrary, such consolidated arbitration shall be before the Panel. To the extent that the Parties are not required to participate in a consolidated arbitration of the merits of each individual Class Plaintiff's claims, absent agreement to the contrary, each individual Class Plaintiff and the Defendants against which that individual Class Plaintiff asserts claims shall select a panel to arbitrate the merits of that individual Class Plaintiff's claims in accordance with the procedures described in paragraphs 4-6 of this Agreement. The existence of this Agreement and its terms shall not prejudice any of the Parties and shall not be relied upon by the Parties, any arbitration panel, any court, or any other tribunal, or considered in any way in resolving any dispute between the Parties as to whether they

may be required to participate, absent their agreement, in a consolidated arbitration of the merits of the individual Class Plaintiffs' claims.

13. The Parties agree that a reasonable protective order is appropriate to safeguard the Parties' commercially-sensitive business information and trade secrets (and that of any third parties) provided in connection with the arbitration proceedings before the Panel (and any separate panels) and will confer among themselves in an effort to agree on the terms of such an order. In the event that they are not able to reach agreement on the terms of such an order, they shall submit their respective proposed orders to the Panel, which shall be responsible for deciding the dispute and entering an appropriate order.

14. The Parties reserve all of their rights and do not waive any arguments or rights as to the permissible scope of discovery. Similarly, the Parties reserve all of their rights and do not waive any arguments or rights as to whether discovery may be used in any other proceeding in New York City or any other location.

15. This Agreement does not alter the scope of the Parties' arbitration agreements in any Charter Party Agreement. All of the Parties reserve their rights to assert in any proceeding that any particular claims are arbitrable or non-arbitrable in lights of the terms of such Charter Party Agreements, or for any other reason. All of the Parties also reserve whatever rights they may have to seek or to oppose any type of consolidation beyond the express terms of this written agreement. Neither the fact of this Agreement nor any of its terms may be used to support or oppose any argument in favor of a class action arbitration or the scope and composition of the proposed class and may not be relied

upon by the Parties, any arbitration panel, any court, or any other tribunal for such purposes.

16. This Agreement does not alter the forum and choice of law provisions in the Parties' Charter Party Agreements.

[5]

17. The undersigned counsel represent that they are authorized to sign and thereby enter into this Agreement on behalf of the Parties, as indicated.

18. This Agreement may be signed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument. A signature transmitted by facsimile shall be deemed to be an original. This Agreement shall be deemed to have been executed when all parties have signed and delivered the same or separate copies thereof.

Acknowledged and agreed to on behalf of all of the Class Plaintiff (Animalfeeds International Corp. and related entities, JLM Industries, Inc., KP Chemical Corp., Nizhnekamskneftekhim USA, Inc., and Tulstar Products, Inc.) by:

/s/ Michael D. Hausfeld Date: 4/29/05

Michael D. Hausfeld
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/s/ Steven A. Kanner Date: 4/27/05
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/s/ Solomon Cera Date: 4/27/05
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/s/ Bernard Persky Date: 4/27/05
Bernard Persky
GOODKIND LABATON
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Acknowledged and agreed to on behalf of all of the Defendants, as indicated by:

/s/ Peter J. Carney Date: 4/27/05
Peter J. Carney
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Fax 202-639-9355
On behalf of Stolt-Nielsen SA, Stolt-Nielsen Transportation Group LTD, Stolt Parcel Tankers, Inc. Stolthaven Terminals, Inc.

/s/ Steven F. Cherry Date:_____
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On behalf of Odfjell ASA and Odfjell USA, Inc.

/s/ Richard J. Rappaport Date: April 27, 2005
Richard J. Rappaport
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On behalf of JO Tankers B.V., JO Tankers, Inc., JO Tankers AS

/s/ Keith Dubanevich Date: April 27, 2005

Keith Dubanevich
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Fax 503-226-0259
On behalf of Tokyo Marine Co. Ltd.

APPENDIX F

FORM NO. 17-18

VEGOILVOY

Tanker Voyage Charter Party

(Adopted January 27, 1950)

[excerpted from 2d Cir. Appendix A2094-A2108]

PREAMBLE

Charter Party made as of _____, 19___, at _____ by and between _____ (hereinafter called the "Owner") of the good _____ MS/SS _____ (hereinafter called "Vessel") and _____ Charterer (hereinafter called the "Charterer").

The Vessel shall receive from the Charterer or supplier at the port or ports of loading, or so near thereto as she may safely get, always afloat, the cargo described in Part I, for delivery as ordered on signing bills of lading to the port or ports of discharge, or so near thereto as she may safely get always afloat; and there discharge the cargo; all subject to the terms, provision, exceptions and limitations contained or incorporated in this Charter Party, which shall include the foregoing preamble and Parts I and II. In the event of a conflict, the provisions of Part I shall prevail over those contained in Part II to the extent of such conflict.

Each of the provisions of this Charter Party shall be and be deemed severable, and if any provision or part of any provision should be held invalid, illegal or unenforceable, the remaining provisions or part or parts of any provisions shall continue in full force and effect.

PART I

A. Description and Position of Vessel. _____ Net Registered Tonnage: _____ total Deadweight: _____ tons of 2,240 lbs. each on _____ draft in salt water on assigned summer freeboard. Capacity for cargo: _____ bbls. of 42 American gallons each at 60°F. or _____ tons of 2,240 lbs. each (10% more or less, Vessel's option.) Classed: _____ Now: _____

B. Part—Full Cargo. _____ If this Charter Party is for a full cargo, then it shall be the quantity the Vessel can carry if loaded to her minimum permissible freeboard for the voyage, but not exceeding what the Vessel can, in the Master's judgment, reasonably stow and carry over and above her tackle, apparel, stores, and furniture, sufficient space to be left in the expansion tanks to provide for the expansion of the cargo. In no event shall Charterer be required to furnish cargo in excess of the quantity stated as the Vessel's capacity for cargo plus 10% of that quantity. If less than a full cargo is to be carried, the quantity stated shall be the minimum quantity which the Charterer is required to supply.

C. Loading Port. _____ Readiness Date: _____ Cancelling Date: _____

D. Discharging Port. _____

E. Total Laytime _____ for loading; _____ for discharging (Running Hours.)

F. Freight Rate. _____ Freight Payable at: _____

G. Demurrage per Hour. _____

H. Special Provisions. _____

PART II

* * *

31. Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act, and a judgment of the Court shall be entered upon any award made by said arbitrator. Nothing in this clause shall be deemed to waive Owner's right to lien on the cargo for freight, dead freight or demurrage.

* * *

Dated at _____ this _____ day of _____

_____ Master

or _____ As Agents for the Master

By _____

APPENDIX G

STATUTORY PROVISIONS

9 U.S.C. § 2—Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 4—Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure

to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 10—Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

OPPOSITION BRIEF

(5)

No. 08-1198

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

STOLT-NIELSEN S.A., *et al.*,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Second Circuit ruled that the arbitration panel's decision that the relevant arbitration clauses permitted class arbitration should not be vacated pursuant to Section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10, because the panel's decision was not in "manifest disregard" of the law. The questions presented are:

1. Whether an arbitration panel's decision that the parties' arbitration clause permits class arbitration should be vacated pursuant to the demanding standards set forth in Section 10 of the FAA where the parties expressly agreed that the panel would decide the procedural issue of whether the parties' agreements permitted class arbitration and where governing law does not forbid the parties' arbitration agreement to be interpreted to allow class arbitration.

2. Whether the Court has jurisdiction to review an interlocutory arbitration award that is procedural, that addresses neither whether a class should be certified nor the merits of the underlying dispute, and that has not caused and may never cause the speculative harm of which Petitioners complain.

CORPORATE DISCLOSURE STATEMENT

Respondent Animalfeeds International Corporation has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

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STATEMENT

The Second Circuit held that the arbitration panel's decision holding that the relevant contracts in this case permit class arbitration should not be set aside pursuant to the demanding standard set forth in Section 10 of the FAA. Contrary to Petitioners' assertions, the Second Circuit's decision was correct, and there are no conflicts among the Circuits. Additionally, this Court does not have jurisdiction over this dispute. The petition should be denied.

1. Respondent alleges that Petitioners conspired to restrain the world market for parcel tanker shipping services by fixing prices and allocating customers, a *per se* violation of federal antitrust law. Petitioner Stolt-Nielsen Transportation Group Ltd. has been accepted into the Amnesty Program of the United States Department of Justice's Antitrust Division, based on its full admission of wrongdoing for participating in the conspiracy. Moreover, Petitioners Odjfell Seachem AS and Jo Tankers BV and several of their executives have pled guilty for their roles in the conspiracy.

2. After Respondent filed a class action complaint in federal court seeking damages for the harm that the conspiracy caused it and all others similarly situated, Petitioners moved to compel arbitration based on the Vegoilvoy charter party's arbitration clause. Pet. App. 3a. The Second Circuit held that the clause required Respondent's federal antitrust claims be sent to arbitration. *Id.* This broadly worded arbitration clause required that "any dispute arising from the making, performance, or termination of this Charter Party shall

be settled in New York" and that "[s]uch arbitration shall be conducted in conformity with the provisions and procedure of the [Federal] Arbitration Act, and a judgment of the Court shall be entered upon any award made by said arbitrator." Pet. App. 5a-6a. The clause is silent on whether the arbitration may proceed on behalf of a class. Pet. App. 6a.

3. The parties subsequently entered into an agreement governing procedures for the arbitration ("Class Arbitration Agreement"). The Class Arbitration Agreement states, among other things, that the arbitrators "shall follow and be bound by Rules 3 through 7 of the American Arbitration Association's Supplementary Rules for Class Arbitrations (as effective October 8, 2003)" ("AAA Rules"). Pet. App. 3a. Rule 3 provides that "[u]pon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the 'Clause Construction Award')." Pet. App. 4a.

4. Pursuant to the Class Arbitration Agreement, Respondent filed a Consolidated Demand for Class Arbitration, Pet. App. 4a, the parties appointed a distinguished three-member arbitration panel ("Panel"), and Respondent then filed a Motion for Clause Construction Award Permitting Class Arbitration. On December 20, 2005, the Panel issued a unanimous eight-page Partial Final Clause Construction Award. Pet. App. 45a-53a. After noting that all parties agreed that the clause construction issue for the relevant contracts was "a matter of first impression, since there has been no

prior judicial or arbitral decision on whether they allow or prohibit class actions," the Panel concluded that the clauses permitted class proceedings. Pet. App. 49a-52a. The Panel did not consider, let alone decide, whether the arbitration would proceed as a class action. Pet. App. 7a n.5.

In reaching its decision, the Panel found that, pursuant to *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), federal maritime law and New York state law, it had to look to the language of the parties' agreement to ascertain whether the parties intended to permit or preclude class arbitration. Pet. App. 49a. The Panel noted that Respondent identified 21 instances where, subsequent to *Bazzle*, arbitrators have published decisions regarding whether broadly-worded arbitration provisions permit class arbitration despite silence on that specific issue. Pet. App. 49a-50a. In each situation, the arbitrators determined that the clauses permitted class arbitration. Pet. App. 50a. The Panel also noted that despite its specific request, Petitioners did not find any instances of an arbitrator concluding, post-*Bazzle*, that a broadly-worded arbitration clause prohibited class arbitration despite silence on the issue. *Id.*

5. Petitioners filed a petition to vacate the Panel's decision in the Southern District of New York. The court concluded, based upon its interpretation of the arbitration clauses under federal maritime law and New York state law, that the Panel's decision was issued in manifest disregard of governing law; the court therefore vacated it. Pet. App. 41a. The Second Circuit reversed. Pet. App. 2a. It explained that Section 10 of the FAA

provides the exclusive grounds for vacating an arbitral award, and that the party seeking to vacate "bears a 'heavy burden.'" Pet. App. 9a-10a. The court also explained why vacating arbitral decisions is unusual: "[t]he parties agreed to submit their dispute to arbitration, more likely than not to enhance efficiency, to reduce costs, or to maintain control over who would settle their disputes and how—or some combination thereof." Pet. App. 11a. In the context of contract interpretation, the court determined that it was required to confirm arbitration awards even if it had serious reservations about the soundness of the arbitrator's reading of the contract. Pet. App. 12a. Accordingly, the court held that the Panel did not manifestly disregard the law: (i) in engaging in its choice-of-law analysis, Pet. App. 21a-22a; (ii) with respect to an established "rule" of federal maritime law, finding custom and usage more of a guide than a rule, Pet. App. 23a-26a; and (iii) with respect to New York law, Pet. App. 26a-27a. The court further noted that the Panel's decision could not have been in manifest disregard of the law since Petitioners agreed that the question raised was a matter of first impression. Pet. App. 24a.

The Second Circuit went on to consider Petitioners' argument that its decisions in *Glencore, Ltd. v. Schnitzer Steel Products*, 189 F.3d 264 (2d Cir. 1999), and *United Kingdom v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993), and the Seventh Circuit's decision in *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), prohibited class arbitration unless expressly provided for in an arbitration agreement. Pet. App. 28a. The court found these cases non-binding because this Court subsequently ruled in *Bazzle* that "when parties agree

to arbitrate, the question whether the agreement permits class arbitration is generally one of contract interpretation to be determined by the arbitrators, not by the court." Pet. App. 29a (citing *Bazzle*, 539 U.S. at 452-53). Finally, the court held that the Panel did not exceed its authority under 9 U.S.C. § 10(a)(4) in ruling as it did. Pet. App. 31a-32a.

REASONS FOR DENYING THE PETITION

The Court should deny the petition for several independent reasons. The question presented by this case is not, as Petitioners assert, whether the FAA forbids an arbitrator from allowing class arbitration pursuant to an arbitration clause that is silent on class arbitrations. Rather, the question here is whether the Panel "exceeded its powers" in construing the arbitration clause within the meaning of Section 10(a)(4) of the FAA, the exclusive basis for vacating an arbitral award. As the Second Circuit held, the Panel did no such thing, because (i) the parties expressly agreed that the Panel would decide whether the arbitration clause permitted class arbitration, and (ii) this Court's well-established precedent—expressed most recently in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), and *Bazzle*—dictates that the procedural issue involved here is for the arbitrators to decide. Applying the Section 10 standard, the Second Circuit correctly held that the Panel had not "exceeded its powers" or "manifestly disregarded" the law. In any event, following this Court's decision in *Bazzle*, the Circuits are not split on the question presented here, and for good reason: *Bazzle* necessarily forecloses a negative answer to this question. Similarly, the Panel's decision could not have

been issued in manifest disregard of established law since the parties conceded that the issue was one of first impression. Finally, this Court does not have jurisdiction to review this interlocutory decision because it is not ripe under Article III and because it is not a "final" award as required by Section 10 of the FAA.

ARGUMENT

I. This Case Is Not A Good Vehicle For Review Because Section 10 Of The Federal Arbitration Act Easily Disposes Of The Petition.

In clear and unmistakable language, the parties' Class Arbitration Agreement states that the arbitrators "shall follow and be bound by" Rule 3 of the AAA Rules. Pet. App. 3a. Rule 3 provides that "the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." Pet. App. 4a. Accordingly, because the Panel rightfully considered whether the underlying contracts permitted class arbitration,[1] Section 10 of the FAA provides the "exclusive regime[]" for reviewing the Panel's decision. *See Hall St. Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008).

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1. Petitioners conceded this critical point. *See* Pet. App. 32a ("the parties specifically agreed that the arbitration panel would decide whether the arbitration clauses permitted class arbitration").

At most, Petitioners argue that the Panel made a mistake when it held that the parties' agreement permitted class arbitration. *See* Pet. at 17-18.[2] But a simple mistake in contract construction (or otherwise) is not a basis for vacating an arbitral award under Section 10: "Section[] 10 . . . address[es] egregious departures from the parties' agreed-upon arbitration: 'corruption,' 'fraud,' 'evident partiality,' 'misconduct,' 'misbehavior,' [and] 'exceed[ing] . . . powers' . . . ." "'Fraud' and a mistake of law are not cut from the same cloth." *Hall St.*, 128 S. Ct. at 1404-05.

Petitioners try to argue around Section 10, constructing non-existing conflicts, *see* Section II, *infra*, and making policy arguments that are not grounded in reality, *see* Section III, *infra*. But the facts are immutable and the law is well-established. A party can ask a court to review an arbitrator's decision, but the reviewing court may only vacate that decision in "very unusual circumstances." *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[The court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.") (citing 9 U.S.C. § 10); *see also* Pet. App. 10a-11a (explaining that a party seeking to vacate an arbitral award bears a "heavy burden," that vacatur is "rare" and "unusual," that courts are "highly deferential to the arbitral award," and that vacatur is limited to "those exceedingly rare instances where some egregious

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2. Petitioners basically ignore the Second Circuit's Section 10 discussion. *See* Pet. App. 9a-27a, 31a-32a. Instead, Petitioners challenge the court's conclusion that pre-*Howsam* and pre-*Bazzle* cases no longer control. *See* Pet. App. 27a-31a.

impropriety on the part of the arbitrators is apparent") (citations omitted). That is the standard the Second Circuit used here.

The Second Circuit recognized Section 10's limitations, and that a mistake in contract interpretation is not grounds to vacate an arbitral award:

> It is tempting to think that courts are engaged in judicial review of arbitration awards under the Federal Arbitration Act, but they are not. When parties agree to arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting arbitration award he perforce does so not on the ground that the arbitrators made a mistake but that they violated the agreement to arbitrate, as by corruption, evident partiality, exceeding their powers, etc.—conduct to which the parties did not consent when they included an arbitration clause in their contract. That is why in the typical arbitration . . . the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators failed to interpret the contract at all, for only then were they exceeding the authority granted to them by the contract's arbitration clause.

Pet. App. 18a (quoting *Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 269 (7th Cir.), *cert. denied*, 127 S. Ct. 582

(2006)).[3] Specifically, the Second Circuit held that the Panel did not disregard the law in engaging in its choice-of-law analysis. In addition to Petitioners assuring the Panel that the choice-of-law issue was "immaterial," Pet. App. 21a (quoting Petitioners' arbitration brief at 7 n.13), the court found that the Panel applied both New York law and federal maritime law, finding that both rendered the same result. Pet. App. 22a.

The Second Circuit also considered whether the Panel disregarded an established "rule" of federal maritime law. Pet. App. 23a. The Panel considered Petitioners' "custom and usage" argument, but concluded that it failed to establish that the parties intended to preclude class arbitration. Pet. App. 25a-26a. Moreover, even if the Panel misapplied custom and usage principles, that misapplication would be one of contract interpretation,[4] which courts are "particularly loath to disturb." Pet. App. 24a-25a.

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3. The Second Circuit also explained that its use of the "manifest disregard" standard was not an additional ground for vacating an arbitral award. Rather, "manifest disregard" is a judicial gloss on the specific grounds for vacatur enumerated in Section 10. Pet. App. 16a-17a. Additionally, the court noted that the Court in *Hall Street* speculated that the term "manifest disregard" may have been "shorthand for § 10(a)(3) and § 10(a)(4), the subsections authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers.'" Pet. App. 17a-18a (quoting *Hall St.*, 128 S. Ct. at 1404).

4. Petitioners have admitted this fact:

> Indeed, [Petitioners] cite no decision holding that a federal maritime rule of construction specifically precludes class arbitration where a charter party's

(Cont'd)

Finally, the Second Circuit found that the Panel did not disregard New York law: "[b]ecause no state-law rule of construction clearly governs the question of whether class arbitration is permitted by an arbitration clause that is silent on the subject, the arbitrators' decision construing such silence to permit class arbitration in this case is not in manifest disregard of the law." Pet. App. 27a.

Accordingly, this case is not a good vehicle for review. Petitioners do not claim that the Panel's decision was procured by corruption, fraud, or undue means, *see* 9 U.S.C. § 10(a)(1), that the arbitrators were partial or corrupt, *see id.* § 10(a)(2), or that the arbitrators were guilty of misconduct, *see id.* § 10(a)(3). Moreover, the Panel did not "exceed[] its powers." *See id.* § 10(a)(4). There is thus no basis to overturn the Second Circuit's decision.

II. The Second Circuit's Ruling Does Not Conflict With The Decision Of Any Other Circuit.

Petitioners strive mightily to create a Circuit split. *See* Pet. at 8-15. But none exists.

Petitioners ignore the Second Circuit's holding: "The question presented on this appeal is whether the arbitration panel, in issuing a clause construction award

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(Cont'd)

> arbitration clause is silent. . . . To the contrary, during oral argument before the arbitration panel, counsel for [Petitioners] conceded that the interpretation of the charter parties in this case was an issue of first impression." Pet. App. 24a.

construing that silence to permit class arbitration, acted in manifest disregard of the law. . . . We conclude . . . that the demanding 'manifest disregard' standard has not been met." Pet. App. 2a. *See* Section I, *supra*. Because the availability of class arbitration is a procedural question, rather than a gateway arbitrability question, the Second Circuit correctly determined that the Panel was required to interpret the parties' agreements. And because the Panel was the correct decision maker, its ruling can only be vacated pursuant to the high standard set forth in Section 10 of the FAA.

Accordingly, for there to be a true "conflict" with the Second Circuit's decision, another Circuit would have had to find that the question whether an arbitration agreement allows class arbitration is a gateway question of arbitrability.[5] To generate that "conflict," Petitioners have segregated the case law into a pre-*Bazzle* time period and a post-*Bazzle* time period. But *Bazzle* was only a continuation of the Court's FAA jurisprudence. Petitioners' artificial division draws a line that does not exist.

In the pre-*Bazzle* period, Petitioners focus on *Champ*, and to a lesser extent on *Boeing* and *Glencore*. *See* Pet. at 9-11. In addition to being decided before *Howsam*, *Pacificare Health Systems, Inc. v. Book*, 538

5. Even if a conflict did exist, this case is not a good case to resolve it. The parties expressly agreed that the arbitrators would decide whether the parties' agreements forbid class arbitration. *See* Section I, *supra*. Accordingly, the *First Options-Howsam* question as to the division of labor between courts and arbitrators disappears. Section 10 of the FAA, therefore, controls.

U.S. 401 (2003), and *Bazzle*, these cases did not involve decisions made (contracts interpreted) by arbitrators. *See Champ*, 55 F.3d at 271-72 (district court determined whether it could certify a class in arbitration); *Boeing*, 998 F.2d at 69 (district court determined whether it could consolidate arbitrations); *Glencore*, 189 F.3d at 266 (same).[6] Accordingly, none of these courts considered, as did the Second Circuit below, (i) whether the question presented was one of arbitrability, and (ii) whether the arbitrators' decision should be vacated pursuant to Section 10 of the FAA.[7]

Nevertheless, Petitioners argue that certain courts have left "intact their pre-*Bazzle* substantive rule prohibiting class arbitration in the face of a silent agreement." Pet. at 14. But the only case Petitioners cite—*Employers Insurance Company of Wausau v.*

6. The cases Petitioners cite in their brief at footnote 4 of page 10 as cases the Seventh Circuit cited in *Champ* also all concern appeals of decisions by district courts, not arbitrators. *See American Centennial Ins. Co. v. National Cas. Co.*, 951 F.2d 107, 107-08 (6th Cir. 1991); *Baesler v. Continental Grain Co.*, 900 F.2d 1193, 1194 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 146 (5th Cir. 1987); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 636 (9th Cir. 1984), *cert. denied*, 469 U.S. 1061 (1984).

7. Petitioners also cite other cases—all pre-*Howsam*, and all in which lower courts, not arbitrators, interpreted the parties' arbitration agreements. *See Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 723 (8th Cir. 2001); *Johnson v. West Suburban Bank*, 225 F.3d 366, 370 (3d Cir. 2000), *cert. denied, Johnson v. Tele-Cash, Inc.*, 531 U.S. 1145 (2001); *Stein v. Geonerco, Inc.*, 17 P.3d 1266, 1268 (Wash. Ct. App. 2001); *Med Ctr. Cars, Inc. v. Smith*, 727 So. 2d 9, 11 (Ala. 1998).

Century Indemnity Co., 443 F.3d 573 (7th Cir. 2006)—does not fulfill the promise of Petitioners' statement. *See* Pet. at 14. Far from showing that the Seventh Circuit continues to adhere to the view that silent clauses foreclose arbitrators from determining that an agreement permits class or consolidated arbitration, *Wausau* demonstrates just the opposite—that the Seventh Circuit, like every other Circuit that has addressed the issue in the wake of *Howsam* and *Bazzle*, considers the construction of silent clauses a matter for the arbitrators.

In *Wausau*, the appellee sought a consolidated arbitration. 443 F.3d at 574. The Seventh Circuit noted that the arbitration agreements did not contain any express provisions regarding consolidated arbitration. *Id.* at 575. Referring to *First Options* and analyzing *Howsam*, the court concluded that the consolidation question is *not* a gateway question of arbitrability:

> The Supreme Court made clear in *Howsam*, 537 U.S. at 84, 123 S. Ct. 588, that procedural issues are presumptively for the arbitrator to decide. Consolidation is a procedural issue. . . . Thus, Wausau now has the burden to show that the Agreements *require* the court, rather than the arbitrator, to address the consolidation issue. . . . Wausau has not met its burden. The Agreements make no mention of consolidation, as Wausau necessarily concedes. The arbitration clause in each Agreement states, in relevant part, that 'any dispute arising out of this Agreement shall be submitted' to arbitration. . . . The Agreements

> do not discuss who decides disputes regarding consolidation, so we presume the arbitrator decides.

Id. at 581 (emphasis in original). That is the same post-*Howsam* analytical framework the Second Circuit applied here.[8]

The Seventh Circuit also noted that its holding is consistent with decisions from other circuits. *See, e.g., Shaw's Supermarkets, Inc. v. United Food and Commercial Workers Union, Local 791, AFL-CIO*, 321 F.3d 251 (1st Cir. 2003) (citing *Howsam* and holding that determination whether to consolidate three grievances into a single arbitration is for the arbitrator); *Dockser v. Schwartzberg*, 433 F.3d 421 (4th Cir. 2006) (finding case resembles *Howsam* and holding that question of proper number of arbitrators is an arbitral decision, not a judicial decision); *see also Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*, 489 F.3d 580 (3d Cir. 2007) (finding *Howsam* and *Bazzle* guide issue of roles of court and arbitrators and holding that in the face of contractual silence as to consolidation, the procedural issue should be resolved in arbitration);

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8. Petitioners also attempt to draw a conflict in Illinois between Illinois state courts and federal courts, *see* Pet. at 14, but none exists. Despite Petitioners' erroneous reading of *Wausau*, the Seventh Circuit clearly embraces the *Howsam* approach, which *Bazzle* simply re-affirmed. In *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250 (Ill. 2006), the Illinois Supreme Court recognized the division of labor set forth in *Howsam*: "the Supreme Court held that whether class claims could be arbitrated was a decision that an arbitrator should make when the arbitration clause does not expressly prohibit class arbitration." *Id.* at 262 (citing *Bazzle*, 539 U.S. at 454).

Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 217 (3d Cir. 2007) (explaining that the *Bazzle* Court "reaffirmed the general division of labor articulated in *Howsam*"); *Pedcor Management Co., Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355 (5th Cir. 2003) (finding, consistent with *Bazzle*, that where arbitration agreement is silent, arbitrators should decide whether class arbitration is available).

Petitioners cannot direct this Court to any circuit court decision that has (i) held as a matter of law that where arbitration agreements are silent, the parties cannot engage in class arbitration, or (ii) held that an arbitral decision potentially allowing class arbitration should be vacated pursuant to Section 10 of the FAA. Accordingly, there is no conflict, and the Court should deny the petition.

III. The Second Circuit Properly Applied This Court's Analytical Framework In Assessing The Type Of Arbitration To Which The Parties Agreed.

A. Questions of arbitrability are reserved for courts, while procedural questions, such as whether an arbitration agreement permits class arbitration, are for arbitrators to decide.

In a recent line of cases, this Court built on its FAA jurisprudence and established an analytical framework by which lower courts can determine whether a particular question should be decided by the arbitrator or the court. The framework is rooted in the long-held determination that "arbitration is a matter of contract,"

Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960), and that arbitration agreements must be "rigorously enforce[d]," *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). The framework also recognizes the "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Consistent with that policy, the Court has held that "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 24-25.

More recently, the Court has put to rest the issue of who decides arbitrability—the arbitrator or the court. Unless there is "'clea[r] and unmistakabl[e]'" evidence, courts should not assume that the parties agreed to arbitrate arbitrability. *First Options*, 514 U.S. at 944 (quoting *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986)). "In this manner the law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement'—for in respect to this latter question the law reverses the presumption." *Id.* at 944-45 (emphasis in original).

In *Howsam*, the Court refined the dichotomy between which disputes the court should decide and which disputes an arbitrator should decide. The Court

described the former question—*who* should decide the question of arbitrability—as a "gateway dispute" reserved for a court to decide. 537 U.S. at 84. The Court cautioned, however, that such gateway disputes involving "questions of arbitrability" have a "far more limited scope" only applicable in "narrow circumstance[s]." *Id.* at 83. The Court left for the arbitrator to answer the bulk of other questions. Accordingly, "procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." *Id.* at 84 (internal quotations and citation omitted) (emphasis in original). "So, too, the presumption is that the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability.'" *Id.* (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25).[9]

Later in the same term in which the Court decided *Howsam*, the Court considered whether parties could be compelled to arbitrate claims arising under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), even though the parties' arbitration agreements could have been construed to limit the arbitrator's ability to award damages under RICO. *Pacificare*, 538 U.S. at 402. The Court reiterated its conclusion that "'the phrase "question of arbitrability"

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9. The Court favorably cited to the Revised Uniform Arbitration Act of 2000 ("RUAA"), which explained that "issues of procedural arbitrability, *i.e.*, whether prerequisites such as time limits, notice, laches, estoppels, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *Howsam*, 537 U.S. at 85 (quoting RUAA § 6, comment 2, 7 U.L.A. 13 (Supp. 2002)).

has a . . . limited scope,'" *id.* at 407 n.2 (quoting *Howsam*, 537 U.S. at 83), before holding that the arbitrator should decide the question: "[g]iven our presumption in favor of arbitration, *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983), we think the preliminary question whether the remedial limitations at issue here prohibit an award of RICO treble damages is not a question of arbitrability." *Id.*; *see Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006) (issue of contract's validity is considered by arbitrator in first instance).

B. *Bazzle* did not alter the analytical framework that established the dichotomy between questions of arbitrability and procedural questions.

With this analytical framework in place—courts decide questions of arbitrability and arbitrators decide procedural questions, including the kind of arbitration proceeding to which the parties agreed—the Court considered *Bazzle*. In *Bazzle*, the Court considered whether the Supreme Court of South Carolina's holding that class arbitration was permissible in the face of a silent arbitration clause was consistent with the FAA. 539 U.S. at 447. The Court's decision pivoted on the following question: "Are the contracts in fact silent, or do they forbid class arbitration as Green Tree Financial Corp. contends?" *Id.* Following precedent, the Court determined that the question as to *what kind* of arbitration, *i.e.*, class arbitration, is allowed under the arbitration contract is a question for the arbitrator, not the court. *Id.* at 451-52.

Nevertheless, the Court considered whether the question before it—whether the arbitration contract forbids class arbitration—was a "gateway" matter that "'contracting parties would likely have expected a court' to decide." *Id.* at 452 (quoting *Howsam*, 537 U.S. at 83). Because the relevant question was *not "whether they* [the parties] *agreed to arbitrate a matter,"* but rather "what *kind of arbitration proceeding* the parties agreed to," the Court concluded that arbitrators are "well situated" to answer the question. *Id.* at 452-53 (citing *First Options*, 514 U.S. at 942-45) (emphasis in original).[10]

C. The Second Circuit's decision is consistent with this Court's precedent.

Nothing in *Bazzle* altered the well-established dichotomy between what courts, as opposed to arbitrators, decide in the first instance. In *Bazzle*, Justice Breyer simply applied the analytical framework to the facts before the Court.

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10. Along with the four-Justice plurality opinion authored by Justice Breyer, Justice Stevens provided the fifth vote that rendered a "controlling judgment of the Court." *Id.* at 455. Citing *Howsam*, Justice Stevens noted that "arguably" the arbitrator, instead of the court should have interpreted the agreement. *Id.* But because the decision to conduct a class arbitration was "correct as a matter of law" and because the petitioner had not challenged the court's authority to rule, Justice Stevens found there was no need to remand. *Id.* Nevertheless, because Justice Breyer's opinion expressed a view "close to" his own, Justice Stevens concurred in the judgment. *Id.*

The Second Circuit did the same. The parties agreed to a broadly worded arbitration clause. Pet. App. 5a. Moreover, the parties entered into a supplemental agreement that expressly established that the arbitrators would decide whether the arbitration agreement allowed for class-wide arbitration. Pet. App. 3a-4a. The question for the court, therefore, was whether the Panel's decision should be vacated pursuant to Section 10 of the FAA.

The Second Circuit was correct to apply Section 10 because the question whether class arbitration is permitted under the parties' agreements is *not* a question of arbitrability that requires a judicial determination. Rather, it is a procedural question that goes to the heart of what kind of arbitration proceeding the parties agreed to. Moreover, the decision is not determinative about whether the parties "are bound by a given arbitration clause." *Howsam*, 537 U.S. at 84. Accordingly, the Second Circuit rightly concluded that the Panel properly decided the question in the first instance: "parties to an arbitration contract would normally expect a forum-based decisionmaker to decide forum-specific procedural gateway matters." *Id.* at 86.

Moreover, through their agreements, the parties provided "clea[r] and unmistakabl[e]" evidence of their agreement as to *who* should decide arbitrability. *First Options*, 514 U.S. at 944 (quoting *AT&T Technologies*, 475 U.S. at 649). Accordingly, the Second Circuit properly concluded that the Panel rightfully determined that the parties' arbitrations agreements allowed class-wide arbitration. The arbitrators' decision, therefore, can only be vacated if Petitioners establish a ground for vacatur under Section 10, which Petitioners have not done.

D. The Second Circuit's decision is consistent with the Federal Arbitration Act.

The Second Circuit followed the FAA and specifically determined under Section 10 that no basis existed to vacate the Panel's award. Petitioners nevertheless argue that silence must be read as a mutual lack of consent *as a matter of law* under the FAA. *See* Pet. at 17-18. But such a holding is inconsistent with *Bazzle* and would eviscerate the FAA's underpinnings, namely that arbitration is a matter of contract governed by the arbitrator's application of contract law and that only in rare circumstances, set forth in 9 U.S.C. § 10, will an arbitrator's decision be overturned. Petitioners would like to pick and choose which sections of the FAA and which parts of the arbitration suit them. But once the decision to arbitrate is made—and it cannot be disputed that Petitioners agreed to arbitrate—then, as this Court has said, the parties "relinquish" their right to judicial review of every interpretation. *See First Options*, 514 U.S. at 942.

Petitioners also argue that class arbitration could expose Petitioners to greater damages and could open a Pandora's Box of procedural issues. *See* Pet. at 19-22. This argument ignores reality. If Petitioners wanted to exclude any of the perceived "risks" associated with class arbitration, they could have negotiated that procedure right out of the arbitration agreements. It is not this Court's role to assist sophisticated parties with drafting their contracts. In addition, the American Arbitration Association amply provides rules for class arbitration, eliminating Petitioners' concerns.

The Illinois Supreme Court explained how well-suited the AAA is to handle class arbitrations:

> In response to this decision [*Bazzle*], the AAA subsequently promulgated rules governing class arbitration. These rules contain provisions similar to Federal Rule of Civil Procedure 23 (Fed.R.Civ.P. 23). The AAA's policy with regard to class arbitration is that it "will administer demands for class arbitration * * * if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims." AAA Policy on Class Arbitrations[.]

Kinkel, 857 N.E.2d at 262.[11] Consequently, there is no reason to read the availability of class arbitration out of the parties' agreements.

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11. The AAA issued its policy in July 2005, before the Panel rendered its decision. *See* AAA Policy on Class Arbitrations, available at http://www.adr.org/Classarbitrationpolicy (last visited May 8, 2009). In light of this additional fact at the Panel's disposal, Petitioners' allegation that the Panel's decision was in "manifest disregard" of the law rings even more hollow.

IV. The Court Does Not Have Jurisdiction Over This Dispute.

A. The arbitral award is not ripe for judicial review.

As a threshold matter, the Court must "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Pursuant to this duty, the Court "must determine whether [Petitioners'] Article III claims demonstrate sufficient ripeness to establish a concrete case or controversy." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 579 (1985) (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138-39 (1974)). Ripeness "draw[s] both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 808 (2003). "[I]ts basic rationale is . . . to protect the [underlying decision maker] from judicial interference until a decision has been formalized and its effects felt in a concrete way by the challenging parties." *Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 200-01 (1983) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)).

The only federal appellate court to decide the precise issue of whether an arbitrators' interlocutory clause construction decision is ripe for judicial review issued its opinion only after the Second Circuit's ruling below, and it squarely rejected the type of piecemeal review that Petitioners now demand. In *Dealer*

Computer Services, Inc. v. Dub Herring Ford, 547 F.3d 558 (6th Cir. 2008), the Sixth Circuit held, pursuant to the same analysis performed below, that a district court lacks jurisdiction to consider a party's motion to vacate an arbitrator's clause construction decision issued under the class arbitration rules that the parties have adopted here. 547 F.3d at 560-65.

The determination of ripeness turns on several factors, including: (1) the likelihood that the harm Petitioners allege ever will occur; and (2) the hardship to the parties if judicial relief is denied at this stage of the proceedings. *See Thomas*, 473 U.S. at 580-81; *Regional Rail*, 419 U.S. at 143; *Pacific Gas*, 461 U.S. at 201; *Abbott Labs.*, 387 U.S. at 149. Application of these factors demonstrates that this matter is not ripe for judicial review.

First, the harm that Petitioners allege—facing "class arbitration," along with its "potentially complex and costly substantive and procedural issues" and heightened "monetary stakes," Pet. at 18-19—may never occur. The Panel expressly limited its ruling to clause construction, Pet. App. 48a-49a, and the Panel was "not called upon to decide, nor [did] it decide, whether the arbitration [would] proceed as a class arbitration." *Id.* Because Petitioners' argument rests on "contingent future events that may not occur as anticipated, or indeed may not occur at all," *Thomas*, 473 U.S. at 580-81, this factor strongly weighs against a finding of ripeness. *See Dealer Computer Services*, 547 F.3d at 562 (for the aforementioned reasons, this factor "strongly weighs against finding the Clause

Construction Award ripe for review") (internal quotations omitted).[12]

Second, the parties will not suffer hardship if judicial review is withheld at this stage of the proceedings. The Panel has yet to certify a class or rule on the merits of the dispute, at which point Petitioners will have the opportunity to seek judicial review. Pet. App. 59a. (Whether a ruling on class certification would be ripe for judicial review is a question that need not be determined here). "Given this prospective opportunity for judicial review," Petitioners will not "suffer any material hardship if review is withheld at this preliminary stage of arbitration." *Dealer Computer Services*, 547 F.3d at 562-63.[13]

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12. Where the Court has found this factor to favor ripeness, the harm that the petitioners faced was immediate, significant and real, in stark contrast to the hypothetical, indeterminate and speculative harm that Petitioners assert here. *See, e.g.*, *Regional Rail*, 419 U.S. at 143 ("occurrence of the conveyance [of rail properties] allegedly violative of Fifth Amendment rights is in no way hypothetical or speculative" and "is virtually a certainty"); *Abbott Labs.*, 387 U.S. at 152-53 ("impact of the regulations upon the petitioners" was "sufficiently direct and immediate" where "immediate compliance with their terms was expected;" if petitioners complied, they would have incurred significant and immediate costs, and if they did not, they would have "risk[ed] serious criminal and civil penalties"). *Cf. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019-20 (1984) (holding matter not ripe where party did not establish that "it had been injured by actual arbitration under the statute").

13. In contrast to this case, the Court has found this factor to militate in favor of judicial review in situations where the hardship the petitioners face is palpable, considerable, and

(Cont'd)

Petitioners seek exactly the type of "premature adjudication" and "judicial interference" that the ripeness doctrine seeks to prevent. *See Pacific Gas*, 461 U.S. at 200-01; *Abbott Labs.*, 387 U.S. at 148-49. Accordingly, the Court should deny review.[14]

(Cont'd)
imminent. *See Regional Rail*, 419 U.S. at 143 ("'One does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending, that is enough.'") (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)); *Pacific Gas*, 461 U.S. at 201 (noting that "postponement of decision . . . would impose a palpable and considerable hardship" on the petitioners, who would have been forced to spend "millions of dollars" over many years in complying with questionable nuclear plan regulations).

14. Further support is garnered from the analogous disposition of certiorari petitions emanating from interlocutory decisions of federal appellate courts. Although the Court has jurisdiction to review such decisions under 28 U.S.C. § 1254(1), it does so only in the "extraordinary" case, *Hamilton-Brown Shoe Co. v. Wolf Bros. Co.*, 240 U.S. 251, 258 (1916), where "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 384 (1893). No such exceptional circumstance exists here. *Cf. Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (denying certiorari where the district court's decision was not sufficiently final because the remedy phase had not been completed).

B. The arbitrators' decision of a preliminary procedural matter is not an "award" subject to review under Section 10 of the Federal Arbitration Act because it is not final.

The conclusion that the Court does not possess jurisdiction to entertain this interlocutory award is underscored by the Federal Arbitration Act itself. Section 10 of the FAA provides that a district court may make an order vacating an arbitral award upon application by a party where, among other circumstances, "the arbitrator exceeded [his] powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).

Federal courts commonly interpret Section 10 to allow judicial review of final arbitration awards, but not of interim or partial rulings like the Panel's decision here. *See, e.g.*, *Lloyd v. Hovensa, LLC*, 369 F.3d 263, 270 (3d Cir. 2004) ("The legislative scheme of the FAA thus reflects a policy decision that, if a district court determines that arbitration of a claim is called for, the judicial system's interference with the arbitral process should end unless and until there is a final award."); *IDS Life Ins. Co. v. Royal Alliance Associates, Inc.*, 266 F.3d 645, 650 (7th Cir. 2001) ("We take 'mutual' and 'final' to mean that the arbitrators must have resolved the entire dispute (to the extent arbitrable) that had been submitted to them."); *Rocket Jewelry Box, Inc. v. Noble Gift Packaging, Inc.*, 157 F.3d 174, 176 (2d Cir. 1998) ("[A]n arbitration award, to be final, must resolve all the issues submitted to arbitration, and . . . it must resolve them definitively enough so that the rights and obligations of the two parties, *with respect to the issues submitted*, do not stand in need of further adjudication.") (emphasis in

original).[15] This interpretation is also supported by Section 9 of the FAA, which repeatedly references "*the* award," 9 U.S.C. § 9 (emphasis added), evidencing further Congress' intent to limit judicial review to truly final arbitration rulings.

The finality rule applies with particular force here. The arbitral decision was expressly deemed "partial," and it concerned a single, preliminary issue that concerns neither the merits of Respondent's claim nor Petitioners' underlying liability. Nor did the ruling even decide whether the arbitration should be certified for class treatment, a determination that will occur later. In this important regard, the decision was not "final" under Section 10(a)(4).[16]

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15. Although several circuits have recognized limited exceptions to this general rule, no such exception applies here. For example, in *Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280 (2d Cir. 1986), the Second Circuit upheld the district court's power to review the award on a counterclaim, concluding that "an award which finally and definitely disposes of a separate independent claim may be confirmed although it does not dispose of all the claims that were submitted to arbitration." *Id.* at 283. *Accord Trade & Transport, Inc. v. Natural Petroleum Charterers Inc.*, 931 F.2d 191, 192-93 (2d Cir. 1991) (where the parties, pursuant to the district court's request, bifurcated the issues submitted to arbitration and requested an "immediate" decision on liability, holding the award "final" for purposes of judicial review). Here, the Panel did not rule on a separate, independent claim, nor did it rule on liability.

16. It bears noting that the Court apparently has never granted certiorari to review an arbitral award as interlocutory in nature as the instant award. *See Hall St.*, 128 S. Ct. at 1400-01; *Bazzle*, 539 U.S. at 449-50; *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 195-96 (2000); *First Options*, 514 U.S. at 940-41; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54 (1995).

C. Whether the arbitration agreement permits the parties to seek judicial review is irrelevant because the parties cannot confer jurisdiction on the federal courts.

The fact that the parties adopted an arbitration rule that "permit[s] any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award," Rule 3 of the AAA Rules, *see* Pet. App. 59a, cannot save Petitioners. The rule does not state that a court would have jurisdiction over this appeal, but merely that the parties could petition a court of *competent jurisdiction*, which no federal court currently is, to review this award. More fundamentally, private parties cannot "waive away Article III-based ripeness deficiencies," and "[f]ederal courts should not grant judicial review of arbitration awards simply because [those] conducting an arbitration would like them to do so." *Dealer Computer Services*, 547 F.3d at 563. *Accord Hall St.*, 128 S. Ct. at 1403 (rejecting argument that grounds for judicial review under the FAA should be expanded when the arbitration agreement called for it because the requested ground was not within the enumerated grounds for review listed in Sections 10 and 11 of the FAA). For the reasons discussed above, neither this Court nor the lower courts that addressed this issue are courts of competent jurisdiction, and the parties' agreement does not change this.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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REPLY BRIEF

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IN THE

Supreme Court of the United States

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,
Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

No. 08-1198

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Animalfeeds argues (*e.g.*, Opp. 5-6) that the availability of class arbitration is a question of contract interpretation to be resolved by arbitrators, with essentially no judicial review. To the contrary, whether the Federal Arbitration Act (FAA) precludes imposition of class arbitration where the parties' contract is silent regarding class arbitration remains just what it was when this Court granted certiorari in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003): an important question of federal arbitration law, on which the

lower courts are divided, that warrants resolution by this Court.

I. THE PETITION PROPERLY PRESENTS A QUESTION OF SUBSTANTIVE ARBITRATION LAW

Animalfeeds argues that (i) the parties agreed to arbitrate whether their contracts permitted class arbitration and (ii) the arbitrators' decision may not be vacated for a "mistake in contract construction." Opp. 7; *see also* Opp. 6-10, 11 n.5, 20. That argument mischaracterizes both the parties' supplemental, post-dispute arbitration agreement (Pet. App. 55a) and the question presented.

The parties agreed to address the question of class arbitration by following American Arbitration Association rules that would allow arbitrators to resolve any contractual issues (consistent with the *Bazzle* plurality's decision), while preserving each side's opportunity for judicial review of whether class arbitration was available as a matter of law. *See* Pet. 5-6. The agreement did not "alter the scope of the Parties' arbitration agreements," and reserved "whatever rights [the parties] may have to seek or to oppose any type of consolidation." Pet. App. 62a. Indeed, it expressly provided for a "partial final award" on class-action availability, subject to immediate judicial review. Pet. App. 4a. Nothing in the agreement provides any basis for denying review here.

In arbitration, the parties agreed—as they do here (Opp. 2)—that their contract was silent as to class arbitration. Pet. App. 49a. They disputed the legal consequences of that silence under the FAA.

The arbitrators rejected petitioners' argument, an argument based on established case law, that imposing

class arbitration without consent is inconsistent with the FAA. Pet. App. 50a-51a. Such a rule, they reasoned, would leave "no basis for a class action absent express agreement among all parties and the putative class members." *Id.* at 51a. That, indeed, is the legal principle petitioners seek to vindicate. It flows directly from the FAA's "central purpose of ... ensur[ing] that private agreements to arbitrate are enforced *according to their terms*," *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (emphasis added; internal quotation marks omitted).

Citing the FAA's provision for review of arbitral awards, Animalfeeds argues (Opp. 7-10) that the arbitrators cannot be held to have disregarded the law or "exceeded their powers." 9 U.S.C. § 10(a)(4). Tellingly, however, it suggests no other mechanism for judicial resolution of the statutory question presented here. On the contrary, its position appears to be that parties must submit the class-availability issue to arbitration, but then have no way *ever* to seek judicial review. *E.g.*, Opp. 11. Private arbitrators would thus have unreviewable authority not only over the interpretation of particular contracts, but over a basic ground rule for arbitration established by federal law. A legal question that has divided the lower courts (Pet. 9-15) would be insulated from any further review.

This Court should not countenance that result. The FAA provides a framework for the entire system of private arbitration. Whether parties may be forced into class arbitrations to which they never agreed is not a minor "procedural" issue (Opp. 11), but a question of substantive law involving the essence of the arbitral agreement. It goes not to the substance of the parties' legal dispute (which they did agree to submit to arbitration), but to the FAA's promise that arbitration

agreements will be enforced "according to their terms." *Mastrobuono*, 514 U.S. at 54.

In any event, arbitrators who, as here, read contracts that are silent regarding class arbitration to permit class proceedings based on general principles or policies, rather than on express terms or other evidence of the parties' actual intent, have either manifestly disregarded the limits of their commission (*see* Pet. App. 19a) or "exceeded their powers" (9 U.S.C. § 10(a)(4); Pet. App. 31a-32a). Whatever the rubric, this sort of error is subject to judicial correction.

Here, the court of appeals reviewed petitioners' FAA argument, as provided for in the parties' supplemental agreement. It rejected that argument on only one basis: an erroneous conclusion that the various opinions in *Bazzle* had "abrogated" the pre-*Bazzle* authority on which petitioners relied. Pet. App. 29a; *see* Pet. 8, 13. Thus, all agree that the arbitration clause here is silent on class proceedings, and a federal appellate court has ruled that the FAA permits imposition of class arbitration on unconsenting parties. It is hard to imagine a case in which the legal question left unresolved by *Bazzle* would be better presented for review.

II. THE PRE-*BAZZLE* CONFLICT PERSISTS

Animalfeeds does not seriously dispute that lower courts have given different answers to the question presented. It seeks instead to shift the focus by characterizing class arbitration as purely a question of contract interpretation or "procedur[e]" (Opp. 11), and then arguing at length that such questions are committed exclusively to arbitrators. Opp. 10-15, 15-22.

The question is not what the parties' contract said about class arbitration, but what rule applies where the

contract is silent. *Cf. Bazzle*, 539 U.S. at 447 (if clause is silent, "South Carolina law interprets the contracts as permitting class arbitration"). Animalfeeds cannot assume away that question of federal arbitration law. Opp. i (reformulating question to assume that "governing law does not forbid" construing silent clause to permit class arbitration). A definitive answer is necessary to guide courts and arbitrators so that enforcement of arbitration agreements' limits does not depend on the nature of the decision-maker or on where arbitration occurs. *Cf.* Opp. 11-12 & n.7 (seeking to distinguish cases not substantively but because they were decided by courts).

Animalfeeds' discussion of *Employers Insurance Co. of Wausau* v. *Century Indemnity Co.*, 443 F.3d 573 (7th Cir. 2006), Opp. 12-15, never grapples with the Seventh Circuit's square holding that *Bazzle* has no precedential effect. *See* Pet. 14 (citing 443 F.3d at 580). That holding leaves intact the rule of *Champ* v. *Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), which governs arbitrations in the Seventh Circuit. *See also Lefkovitz* v. *Wagner*, 395 F.3d 773, 780 (7th Cir. 2005) ("consolidation of arbitrations is permissible only if the ... arbitration ... clauses authorize it"). That ruling directly contradicts the Second Circuit's ruling here. Accordingly, in the Seventh Circuit, this case would have come out the other way. *See* Pet. App. 27a-30a. That square conflict, with variations discussed in the petition, warrants resolution by this Court.

Animalfeeds concludes its conflict discussion by asserting (Opp. 15) that petitioners have identified no case holding as a matter of law that parties cannot be forced to engage in class arbitration where their agree-

ment is silent. On the contrary, *Champ* and other decisions cited in the petition hold just that. Pet. 9-11.[1] Other courts, now including the Second Circuit, disagree. Pet. 11-14. Animalfeeds would hide this conflict on a fundamental question of federal arbitration law under a veil of unreviewable arbitral discretion. This Court should grant review and resolve it.

III. THE QUESTION PRESENTED WARRANTS REVIEW

As the petition demonstrates (Pet. 17-24), the question presented is important to the many parties who need a clear, reliable framework for enforcing commercial arbitration agreements under the FAA. Animalfeeds offers only two responses: The AAA has promulgated rules that may be used to guide class arbitrations (Opp. 21-22), and the parties here "could have negotiated [class arbitration] right out of the arbitration agreements" (Opp. 21).

The arbitration community has indeed sought to adapt to the possibility of class arbitration, particularly in light of uncertainty caused by *Bazzle*. Ironically, Animalfeeds now seeks to rely on the AAA's procedures as a panacea for the burdens and challenges posed by class proceedings, while repudiating the AAA's widely adopted provision for early judicial review of decisions in this evolving area. *Compare* Opp. 21-22 *with* Opp. 29. In any event, the fact that private parties can devise ways of managing class proceedings is no response to petitioners' points that class arbitra-

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[1] This FAA issue is not one of "first impression," and petitioners never "conceded" that it was. *E.g.*, Opp. 6, 9 n.4. The only novel question was interpretation of the parties' particular contracts—which all agree are "silent" as to class arbitration (*e.g.*, Opp. 2).

tion is dramatically different, legally and practically, from individual arbitration, and thus agreement to class arbitration cannot be inferred from, or imposed on the basis of, agreements to arbitrate individual disputes. *See* Pet. 18-22.

The argument that petitioners could have negotiated around the class issue ignores the fact that they signed industry-standard contracts, widely used for 50 years in maritime transactions with no hint they would be deemed to authorize class arbitration. *See* Pet. 4, 6, 22 & n.12; A.S.B.A. Amicus Br. 7 ("Since almost every charter party in all the ocean transportation trades provides for arbitration ... the potential for mischief is great."). It also assumes that courts would honor express contractual exclusions, which is by no means clear. *See, e.g., In re Am. Express Merchants' Litig.*, 554 F.3d 300, 320 (2d Cir. 2009) (invalidating no-class-arbitration provision as impediment to "vindication of statutory rights"); *Shroyer* v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 984 (9th Cir. 2007) (invalidating as "unconscionable").

More fundamentally, Animalfeeds' argument begs the question presented. The issue is not whether there is "reason to read the availability of class arbitration *out of* the parties' agreements," Opp. 22 (emphasis added), but whether the FAA permits arbitrators or courts to read agreements to participate in class arbitration *into* contracts that are silent on the issue. The difference is critical because parties must be able to count on U.S. courts to enforce arbitration agreements without straying fundamentally from their terms. *See* U.S. Chamber of Commerce Amicus Br. 1-2 ("Compelling parties to resolve disputes through costly, time-consuming and high-stakes class arbitration, where the parties have not expressly agreed to do so, frustrates

the parties' intent, undermines their existing agreements, and erodes the benefits offered by arbitration as an alternative to litigation.").

In the end, Animalfeeds agrees with petitioners that "arbitration is a matter of contract," and that an incorrect decision as to the rule of law governing this case would "eviscerate the FAA's underpinnings" (Opp. 21). The dispute is over what rule honors the FAA's central principle that "[a]rbitration ... is a matter of consent, not coercion." *Mastrobuono*, 514 U.S. at 57. That dispute is at least as important today as at the time of *Bazzle*, and the Court should grant review to resolve it.

IV. THERE IS NO JURISDICTIONAL ISSUE

Finally, for the first time in four years of litigation, Animalfeeds questions whether the district court had jurisdiction. Its belated arguments are unavailing.

A. Ripeness

Animalfeeds first contends the case is unripe. Opp. 23-26. Ripeness, however, involves both Article III jurisdictional limits and "'prudential reasons for refusing to exercise jurisdiction'" where it exists. Opp. 23 (quoting *Nat'l Park Hospitality Ass'n* v. *Dep't of the Interior*, 538 U.S. 803, 808 (2003) (*NHPA*)). Animalfeeds does not argue lack of justiciability in the Article III sense.[2] Its arguments go only to the prudential question whether petitioners' argument that the arbitrators here lack authority to conduct class proceedings should

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[2] Likewise, Animalfeeds has never disputed statutory jurisdiction under 9 U.S.C. § 203 and 28 U.S.C. §§ 1331, 1333. Pet. 7 n.3.

be heard now, as the parties agreed. Unlike an Article III objection, that prudential contention is one this Court *may*, but need not, entertain at this late date. *See NPHA*, 538 U.S. at 808; *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). Here, prudential objections never raised below have been waived.

In any event, the case is ripe. The question presented is "fit for review": it is purely legal, and will not be clarified by any further factual development. *See NPHA*, 538 U.S. at 812. There is no concern about protecting a non-judicial decisionmaker from premature interference, *see PG&E* v. *State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 200 (1983), because the parties' supplemental arbitration agreement expressly provides for judicial review at this stage. Pet. 7; Pet. App. 3a-4a.[3] Decisions adverse to petitioners have been "formalized," and absent review will be promptly "felt in a concrete way" through extensive litigation over class certification. *PG&E*, 461 U.S. at 200. For the same reason, the hardship to petitioners of withholding review is palpable: Because of the arbitrators' class-availability award, Animalfeeds proposes to subject petitioners to a year-long class-certification proceeding, including extensive fact and expert discovery. While the expense and burden of such proceedings have become normal in federal court, *see Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 558-559 (2007) (noting discovery burdens in class-action antitrust cases), they are anathema to arbitration, *e.g.*, *NBC* v. *Bear Stearns &*

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[3] The parties negotiated this review feature specifically to protect each side's interest in the correctness of a critical decision. It is Animalfeeds' new "ripeness" argument that would interfere with agreed arbitration procedures.

Co., 165 F.3d 184, 190-191 (2d Cir. 1999) (arbitration "especially at odds with the broad-ranging discovery made possible by the Federal Rules"). The immediate prospect of that exponential burden easily satisfies any prudential ripeness test.

Animalfeeds cites *Dealer Computer Services, Inc.* v. *Dub Herring Ford*, 547 F.3d 558, 564 (6th Cir. 2008), which held a class-availability challenge unripe because the arbitrators had not yet certified a class. Whatever the merits of that decision, it provides no basis for denying review here. In *DCS* (which was a breach-of-contract dispute, not a complex antitrust case), the challenger did not articulate any immediate harm, and the court "presum[ed]" that the only harms would stem from actual certification of a class. *Id.* at 561-562 & n.3. Here, harm to petitioners is imminent, regardless of the ultimate certification decision: a year of pre-certification litigation, involving fact and expert discovery for a putative class proceeding in a complex, international antitrust dispute. *See* Pet. 5. Thus, just as the presumed "absence of hardship for DCS at this juncture" led the Sixth Circuit to conclude that DCS's motion to vacate was "premature," 547 F.3d at 563, the presence of immediate hardship for petitioners settles any ripeness inquiry here.

B. "Finality"

Animalfeeds' "finality" argument (Opp. 27-28) is likewise without merit. First, there is again no question that the district court had subject-matter jurisdiction over petitioners' motion to vacate. 9 U.S.C. § 203; 28 U.S.C. §§ 1331, 1333. Section 10 of the FAA, on which Animalfeeds relies (Opp. 27), is not a jurisdictional statute. *E.g.*, *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 26 n.32 (1983). Ar-

guments against vacating a particular award under the FAA are not jurisdictional. *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 516 (2006); *cf. Union Switch & Signal Div. Am. Std. Inc.* v. *United Elec., Radio & Mach. Workers of Am., Local 610*, 900 F.2d 608, 612-614 (3d Cir. 1990). Such non-jurisdictional arguments may be waived, particularly when "raised defensively late in the lawsuit." *Arbaugh*, 546 U.S. at 504. That is surely the case here.

In any event, the argument is wrong. The cases Animalfeeds cites (Opp. 27) do not refuse to review partial final awards.[4] In contrast, those it consigns to a footnote (Opp. 28 n.15) properly hold that where parties direct arbitrators to enter a "partial final award"—including one intended to have "immediate collateral effects in [a] judicial proceeding"—courts will honor that agreement. *Trade & Transp., Inc.* v. *Natural Petroleum Charterers Inc.*, 931 F.2d 191, 195 (2d Cir. 1991). "[T]he submission by the parties determines the scope of the arbitrators' authority," and "if the parties agree that the panel is to make a final decision as to part of the dispute, the arbitrators have the authority and responsibility to do so." *Id.*; *Metallgesellschaft A.G.* v. *M/V Capitan Constante*, 790 F.2d 280, 282 (2d Cir. 1986) (affirming confirmation of partial award, in "compl[iance] with the congressional intent that we enforce the [parties'] agreement"). Indeed, while courts will consider whether review is premature (and in doing so sometimes speak loosely in terms of "jurisdic-

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[4] Two involved requests to vacate awards because arbitrators had "imperfectly executed" their powers by rendering awards that were not fully final. 9 U.S.C. § 10(a)(4). The third holds that when a court compels arbitration it should stay, not dismiss, the judicial proceeding.

tion"), they review many such partial final awards. *E.g.*, *Hart Surgical, Inc.* v. *Ultracision, Inc.*, 244 F.3d 231, 234-235 (1st Cir. 2001) (award on liability where parties agreed to bifurcate issues); *cf. Publicis Commc'n* v. *True N. Commc'ns Inc.*, 206 F.3d 725, 728 (7th Cir. 2000) (citing examples).[5] Here the parties and the arbitrators all understood and intended that the class-availability award would be final and reviewable. Animalfeeds' new "jurisdictional" objection is without merit.[6]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[5] Especially after *Bazzle* and the AAA's promulgation of the rules adopted here, these partial final awards include class-availability awards. *E.g.*, *Labor Ready Northwest* v. *Crawford*, 2008 WL 1840749, at *2-4 (D. Or. Apr. 21, 2008); *JSC Surgutneftegaz* v. *President & Fellows of Harvard Coll.*, 2007 WL 3019234, at *2 (S.D.N.Y. Oct. 11, 2007).

[6] Animalfeeds raises its meritless ripeness and finality arguments at a time when simply denying review, as it suggests, would leave a binding decision below. *Cf. DCS*, 547 F.3d at 562-563 (vacating judgment confirming class-availability award and making clear DCS would have "ample opportunity to obtain judicial review" later if arbitrators certified class). If this case were unripe or not "final," the proper disposition would be to vacate with instructions to dismiss for lack of present jurisdiction. *Cf. United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

Respectfully submitted.

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AMICUS CURIAE BRIEF

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BRIEF OF THE ASSOCIATION OF SHIP BROKERS & AGENTS (U.S.A.), INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Can a party to an ASBATANKVOY form of charter party be required to arbitrate disputes arising thereunder with non-parties pursuant to a theory of "class action status"?

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BRIEF OF THE ASSOCIATION OF SHIP BROKERS & AGENTS (U.S.A.), INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Association of Ship Brokers & Agents (U.S.A.), Inc. ("A.S.B.A.") respectfully submits this brief *amicus curiae* in support of Petitioners. Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. All parties have consented to the filing of this brief, and their letters of consent will be filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

A.S.B.A. is a membership trade organization founded in 1934.* Its members consist of the leading ship brokers and agents in the United States. Its purpose is to foster and improve high standards of professional conduct and practices. A.S.B.A. promotes the interest of its members, in particular, and the ocean shipping industry, in general, in various ways. It conducts educational seminars, home study and on-line courses about the shipping business. It publishes a newsletter containing articles of current interest to its members.

Of particular relevance to this petition, A.S.B.A. maintains and causes to be published various standard form charter parties in common usage in the shipping business. One of these forms is a tanker voyage charter used throughout the tanker shipping industry and known by its code name ASBATANKVOY.

Clause 24, ARBITRATION, of the ASBATANKVOY, has now been interpreted by the Partial Final Clause Construction Award in the underlying arbitration and by the court of appeals in a manner which is contrary to the long-standing understanding of the tanker shipping industry that the clause provides for private arbitration of disputes between only those who are parties to the charter party. This class-arbitration interpretation has become a cause for concern amongst the tanker broker members of A.S.B.A. The decision has the potential of adversely affecting their business as many foreign principals would be reluctant to make charter parties in the United States if they could be forced to participate in class arbitrations.

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* Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or part, and no person other than the *amicus curiae* or its counsel made any monetary contribution to its preparation or submission.

For the reasons set forth below, it is in the interest of A.S.B.A. that the ASBATANKVOY have a consistent, universal interpretation of the arbitration clause that disputes arising under the charter party remain private disputes and not be subject to becoming involved in disputes arising under other charter parties for which the parties thereto have no concern.

STATEMENT OF THE CASE

Amicus Curiae A.S.B.A. adopts the statement of the case presented in the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The ASBATANKVOY form provides for private arbitration of disputes between the contract parties. The history and structure of the form, as well as long-standing commercial usage, clearly does not support the interpretation given by the arbitration panel and the court of appeals to Clause 24 permitting involuntary class arbitration.

ARGUMENT

At the outset, A.S.B.A. supports and agrees with the reasons for granting the petition set forth in the petition, but A.S.B.A.'s interest is broader and seeks to protect the integrity of the ASBATANKVOY form as well as the interests of its members and the very many companies that use and rely upon the form.

Until now, no panel of arbitrators has interpreted the ASBATANKVOY arbitration clause so as to permit class arbitration. Although the discussion in *Stolt-Nielsen v. Animalfeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008), focused on the interpretation of the clause, it must be understood that the arbitrators were appointed pursuant to a detailed agreement and not in accordance with the method set forth in the arbitration clause. Further, the arbitrators' authority is

initially limited to determining whether the ASBATANKVOY arbitration clause permits "this consolidated arbitration to proceed as a class arbitration." Pet. App. 52a.

The ASBATANKVOY Form of Tanker Voyage Charter

The ASBATANKVOY is one of the most universal and used charter parties in the ocean transportation of crude oil, petroleum products and liquid chemicals. *See* Thomas McCune, *The ASBATANKVOY Charter, An Analysis of Selected Clauses Together with Annotations of Arbitration Awards and Judicial Decisions*, 2 (Lloyd's of London Press Ltd. 1984) (1982) (detailing the prominence, origin, and history of usage of the ASBATANKVOY form charter party). The ASBATANKVOY is a private contract between two parties and the arbitration clause is designed to resolve any disputes that may arise between them.

The ASBATANKVOY form is divided into three parts, the Preamble, Part I, and Part II. *See* Appendix attached hereto (providing full text of the ASBATANKVOY Preamble, Part I, and Clause 24 of Part II).

The Preamble identifies the "Owner" and the "Charterer" and the name of the vessel that will perform the voyage.

Part I consists of lettered clauses "A" through "M." These clauses specify the description of the vessel, the voyage, the amount of cargo to be carried between the named loading and discharging ports, the applicable freight rate and related matters concerning the voyage.

Clause "K" of Part I states:

"The place of General Average and arbitration proceedings to be London/New York (strike out one)."

Part II consists of 26 numbered clauses of which Clause 24 is the arbitration clause. It is a long arbitration clause and sets forth in detail how the parties to the charter should commence and conduct the arbitration. *See* Appendix at 3a-4a (quoting full text of Clause 24). For present purposes, part of these provisions is that the arbitration shall be conducted "pursuant to the laws relating to arbitration there in force . . . ." Thus, if New York is stricken in Part I, then the arbitration takes place in London pursuant to English law.

The History of Clause 24-ARBITRATION

The ASBATANKVOY was first published by A.S.B.A. in October 1977. A.S.B.A. did not develop the form but, as will be explained, took it over from Exxon, as the company was then known. Exxon had used the identical form, including the arbitration clause, since 1969 in its form known as the EXXONVOY 1969. This form was used not only by Exxon but by many third parties, both owners and charterers. These third parties found the form to be fair and that it balanced the commercial interests of both sides. Subsequently, Exxon developed a new substantially different charter and let it be known that it would no longer support, print or otherwise make available the EXXONVOY 1969. The trade did not believe the new Exxon charter party was fair. As a result, A.S.B.A. agreed to take over, maintain, and publish the EXXONVOY 1969 and renamed it, without any change in wording, the ASBATANKVOY. The form has remained, again without any change in wording, in general usage to this day.

A.S.B.A. also maintains and has printed other charter party forms. One of them is the New York Produce Exchange, Government form, Time Charter, which dates back to 1913. As modified over the years, it is still in general usage in the dry cargo trades. It has an arbitration clause.

See Grant Gilmore Jr. & Charles L. Black, *The Law of Admiralty*, app. C at 802-09 (1957).

Proper Construction of the ASBATANKVOY

The concept and indeed potential reality of class actions under Clause 24 is fundamentally at odds with the singular wording and structure of the clause.

The Preamble specifies *the owner* and *the charterer* who are parties to the charter. Indeed, those named parties are the only ones who may petition the district court for an order compelling arbitration. Federal Arbitration Act, 9 U.S.C. §§ 3-4.

Under Clause 24, only "differences and disputes of whatsoever nature *arising out of this charter* . . . shall be put to arbitration . . . ." (Emphasis supplied.) Only the owner or charterer shall have the right to appoint an arbitrator and a second arbitrator in the event the other party fails to appoint its arbitrator within 20 days of the appointment of the first arbitrator. Only a party may designate the disputes to be heard.

Nothing in Clause 24 allows for or permits consolidation or designation as a class arbitration. The ordinary reasonable person involved in chartering ships under this form, or any other for that matter, would never consider reading into the clause wording that is not there. While the New York Procedures Agreement reached by the parties in this case limits the potential class to members who entered into charters which provide for New York arbitration, this potential class does include foreign companies.

The decision of the court of appeals is broadly worded and implies that any arbitration panel appointed in accordance with Clause 24 has the power to greatly expand those who may be permitted to arbitrate under the clause. While the underlying dispute here deals with anti-trust

matters, there is no reason why the rationale could not be expanded to many other areas of potential mass claims. Since almost every charter party in all the ocean transportation trades provides for arbitration, and A.S.B.A. is not aware of any that expressly excludes class arbitration, the potential for mischief is great.

This potential expansion would place a great burden of cost, time, and liability on a party who honestly believed that it had entered into a private contract with a private arbitration clause that could be used to settle disputes arising thereunder.

The potential harm to A.S.B.A. and its members and the foreign commerce of the United States is clear. There would be less fixing of charters in the United States as foreign companies would look elsewhere for their shipping contracts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 23, 2009

APPENDIX

TANKER VOYAGE CHARTER PARTY

PREAMBLE

_____ _____
Place Date

IT IS THIS DAY AGREED between _____ _____chartered owner/owner (hereinafter called the "Owner") of the _____ SS/MS_____ (hereinafter called the "Vessel") and _____ _____(hereinafter called the "Charterer") that the transportation herein provided for will be performed subject to the terms and conditions of this Charter Party, which includes this Preamble and Part I and Part II. In the event of a conflict, the provisions of Part I will prevail over those contained in Part II.

PART I

A. Description and position of Vessel:

Deadweight: tons (2240 lbs) Classed:

Loaded draft of Vessel on assigned summer freeboard
ft in. in salt water.

Capacity for cargo: tons (of 2240 lbs. each) % more or less, Vessel's option.

Coated: ☐ Yes ☐ No

Coiled: ☐ Yes ☐ No Last two Cargoes:

Now: Expected Ready:

B. Laydays

Commencing: Canceling:

C. Loading Port(s)

Charterer's Option

D. Discharging Port(s):

Charterer's Option

E. Cargo

Charterer's Option

F. Freight Rate: per ton (of 2240 lbs. each).

G. Freight Payable to: at

H. Total Laytime in Running Hours:

I. Demurrage per day:

J. Commission of % is payable by Owner to

on the actual amount freight, when and as freight is paid.

K. The place of General Average and arbitration proceedings to be London/New York (strike out one).

L. Tovalop: Owner warrants vessel to be a member of TOVALOP scheme and will be so maintained throughout the duration of this charter.

M. Special Provisions:

PART II

24. ARBITRATION. Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York or in the City of London whichever place is specified in Part I of this charter pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen. The decision of any two of the three on any point or points shall be final. Either party hereto may call for such arbitration by service upon any officer of the other, wherever he may be found, of a written notice specifying the name and address of the arbitrator chosen by the first moving party and a brief description of the disputes or differences which such party desires to put to arbitration. If the other party shall not, by notice served upon an officer of the first moving party within twenty days of the service of such first notice, appoint its arbitrator to arbitrate the dispute or differences specified, then the first moving party shall have the right without further notice to appoint a second arbitrator, who shall be a disinterested person with precisely the same force and effect as if said second arbitrator has been appointed by the other party. In the event that the two arbitrators fail to appoint a third arbitrator within twenty days of the appointment of the second arbitrator, either arbitrator may apply to a Judge of any court of maritime jurisdiction in

the city above-mentioned for the appointment of a third arbitrator, and the appointment of such arbitrator by such Judge on such application shall have precisely the same force and effect as if such arbitrator had been appointed by the two arbitrators. Until such time as the arbitrators finally close the hearings either party shall have the right by written notice served on the arbitrators and on an officer of the other party to specify further disputes or differences under this Charter for hearing and determination. Awards made in pursuance to this clause may include costs, including a reasonable allowance for attorney's fees, and judgement may be entered upon any award made hereunder in any Court having jurisdiction in the premises.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
APR 27 2009
OFFICE OF THE CLERK

No. 08-1198

IN THE

Supreme Court of the United States

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL US, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation of businesses and associations, with an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every relevant economic sector and geographical region of the country. An important function of the Chamber is the representation of its members' interests by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

Many of the Chamber's members and affiliates routinely utilize agreements to arbitrate in their business contracts. By agreeing to arbitrate, they are able to avoid costly and time-consuming litigation over disputes arising out of and relating to these contracts by submitting to a streamlined, yet fair process based upon the mutual consent of the parties.

Unlike litigation, private arbitration is purely a matter of consent, not coercion. Compelling parties to resolve disputes through costly, time-consuming and high-stakes class arbitration, where the parties have not expressly agreed to do so, frustrates the parties' intent, undermines their existing agreements, and erodes the benefits offered by

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[1] Pursuant to Rule 37.6, no counsel for any party to these proceedings authored this brief, in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person, aside from the *amicus curiae*, their members, and their counsel, made any monetary contribution for the preparation or submission of this brief. Petitioners and respondent have consented to the filing of this brief, and letters reflecting such consent have been filed with the Clerk.

arbitration as an alternative to litigation. Simply put, imposition of class arbitration on a "silent" agreement is contrary to the central goal of the Federal Arbitration Act: To ensure that written agreements to arbitrate are enforced in accordance with the terms adopted by the parties.

The Chamber and its members thus have a vital interest in having this Court grant certiorari and reverse the decision below, which held that that class arbitration may be imposed by an arbitrator in a proceeding involving a "silent" arbitration agreement.

INTRODUCTION AND SUMMARY

In *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003) (plurality opinion), this Court granted review to consider whether the Federal Arbitration Act ("FAA") permits the imposition of class arbitration on an agreement to arbitrate that is "silent" as to whether the parties agreed to arbitrate on a class-wide basis. In *Bazzle*, however, this Court did not answer that question because a plurality of the Court concluded that the arbitrator, not a court, should have made the initial determination as to what the contract meant, *i.e.*, whether it was, in fact, "silent" as to class arbitration. *Id.* at 452-53 (plurality opinion). Further, the *Bazzle* Court had no occasion to address the standards that the arbitrator should apply in resolving whether class arbitration was appropriate in the face of a "silent" agreement. In the wake of *Bazzle*, arbitrators increasingly are being asked to determine whether to impose class arbitration in cases where the parties' agreement contains no language addressing the availability of class arbitration.

Under the FAA, private agreements to arbitrate must be "enforced according to their terms." *Volt*

Info. Scis. v. *Board of Trs.*, 489 U.S. 468, 479 (1989). As petitioners amply demonstrate, Pet. 9-15, the majority of federal circuit courts have concluded that the FAA prohibits *a court* from imposing class arbitration on a silent agreement because agreements to arbitrate under the FAA must be "enforced according to their terms." That conclusion should be no different when this issue is presented to an arbitrator. The command that agreements to arbitrate "shall be valid, irrevocable, and enforceable" is binding not only on courts, 9 U.S.C. § 2, but also on arbitrators who, under the FAA, are "bound to effectuate the intentions of the parties." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636 (1985).

This case presents an ideal opportunity for the Court to provide necessary guidance and ensure that arbitration agreements are interpreted by courts and arbitrators in a manner consistent with the requirements of the FAA. When the terms of the parties' arbitration agreement do not expressly provide for class-wide arbitration, neither courts nor arbitrators should be permitted to rewrite the parties' agreement by transforming the arbitration to which the parties actually consented into a "hybrid" proceeding that requires substantial "external supervision" by courts. *Keating* v. *Superior Court*, 645 P.2d 1182, 1209 (Cal. 1982) *rev'd on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984); see also *Discover Bank* v. *Superior Court*, 113 P.3d 1100, 1106 (Cal. 2005) (class arbitration is a "hybrid procedure").

At its core, arbitration under the FAA is a "matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. When parties agree to

arbitrate, they "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors*, 473 U.S. at 628. Imposition of class arbitration on a "silent" arbitration agreement violates the FAA's requirement that these agreements be placed on "equal footing" with other contracts negotiated with private parties. *Cf. Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

Under generally applicable contract law, a contract may not be rewritten to add terms that fundamentally transform the agreement when the parties themselves have not agreed to do so. Instead, an additional term may be supplied only when necessary and reasonable to effectuate the intent of the parties. It is neither necessary nor reasonable to assume – in the face of silence – that the parties intended to allow class arbitration because it would undermine many of the benefits of traditional arbitration and would present significant drawbacks to both defendants and absent class members. Indeed, imposition of class arbitration onto an agreement that makes no mention of it "would disrupt[] the negotiated risk/benefit allocation and direct[] [the parties] to proceed with a different sort of arbitration." *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (internal quotation marks omitted; alterations in original).

Finally, the need for review in this case is critical because the decision below, if permitted to stand, undermines congressional policy under the FAA, and erodes the benefits of arbitration as a quicker, more efficient and more informal alternative to litigation. Under the FAA, parties are entitled not only to choose arbitration over litigation, but "also the

procedure to be used in resolving the dispute." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). This Court's decision in *Bazzle*, however, is being misinterpreted to grant *carte blanche* to arbitrators to impose class arbitration when presented with a "silent" agreement that does not authorize such a fundamental transformation of the arbitral process. Given the narrow judicial review applicable to decisions of arbitrators under the FAA, *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396, 1403-05 (2008), the Court should provide necessary guidance by making clear that arbitrators and courts alike are bound by the FAA's core command rigorously to enforce arbitration agreements and thereby ensure that they are enforced in accordance with their terms.

ARGUMENT

REVIEW OF THE DECISION BELOW IS IMPORTANT TO ENSURE THE PROPER APPLICATION OF THE FAA AND THE CONTINUED VIABILITY OF PRIVATE AGREEMENTS TO ARBITRATE.

1. The FAA was enacted "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate" by placing them "'upon the same footing as other contracts.'" *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 219-20 (1985) (quoting H.R. Rep. No. 68-96, at 1 (1924)). In Section 2, Congress provided that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This broad provision – the "centerpiece" of the FAA – is "at bottom a policy guaranteeing the enforcement of

private contractual arrangements." *Mitsubishi Motors*, 473 U.S. at 625.

Under the FAA, arbitration agreements must be enforced and interpreted under the same principles of contract law applicable generally to any other contract. See, *e.g.*, *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 686-87 (1996); *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987). That core obligation applies both to courts as well as to arbitrators, who are "bound to effectuate the intentions of the parties." *Mitsubishi Motors*, 473 U.S. at 636; *accord 14 Penn Plaza LLC* v. *Pyett*, 2009 U.S. LEXIS 2497, at *28 (U.S. Apr. 1, 2009) ("'the arbitrator's task is to effectuate the intent of the parties'") (quoting *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 53 (1974)).

Like any contract, an agreement to arbitrate is "'a matter of consent, not coercion.'" *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (quoting *Volt*, 489 U.S. at 479). And, as with any contract, "parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. Parties may choose to limit the types of claims subject to arbitration, see *Mitsubishi Motors*, 473 U.S. at 628, or they may select particular rules and procedures that will govern the manner in which their arbitration proceeds, see *Volt*, 489 U.S. at 479; *Scherk*, 417 U.S. at 519. The FAA does not mandate or prefer any specific set of rules; rather, whatever terms the parties choose, the "primary purpose" of the FAA is "ensuring that private agreements to arbitrate are enforced *according to their terms*." *Volt*, 489 U.S. at 479 (emphasis added).

2. Under generally applicable contract law, parties are bound by the terms of their agreement, and those agreements may not be rewritten by courts or arbitrators to add provisions that the parties could

have included, but did not.[2] Instead, when the terms of an agreement are "silent" on a matter, an additional term may be supplied only if (i) "essential to a determination of [the parties'] rights and duties," *and* (ii) "reasonable in the circumstances." See *Restatement (Second) of Contract Law* § 204 (1981). Put another way, under generally applicable contract law, terms may be added to a "silent" agreement only where "the parties must have intended them and must have failed to express them only because of sheer inadvertence or because they are too obvious to need expression." 11 Richard A. Lord, *Williston on Contracts* § 31:7 (4th ed. 1999).

For example, under the FAA, courts have repeatedly rejected claims that an arbitration agreement cannot be enforced because it fails expressly to state that, by agreeing to arbitrate, the parties are waiving their right to a jury trial. *E.g.*, *Pierson* v. *Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984) ("loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate").[3] In such cases, an

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[2] *E.g.*, *Vermont Teddy Bear Co.* v. *538 Madison Realty Co.*, 807 N.E.2d 876, 879 (N.Y. 2004) ("[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.") (internal quotation marks omitted); *Apra* v. *Aureguy*, 361 P.2d 897, 899 (Cal. 1961) ("In construing a contract which purports on its face to be a complete expression of the entire agreement, courts will not add thereto another term, about which the agreement is silent.") (internal quotation marks omitted).

[3] *See also Snowden* v. *Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (jury trial waiver, though not expressly provided, was implicit as a "'necessary'" and "'obvious'" consequence of the arbitration agreement); *Robert Bosch Corp.* v. *ASC, Inc.*, 195 F. App'x 503, 507 (6th Cir. 2006) ("the loss of

agreement to arbitrate necessarily, reasonably and obviously implies a waiver of a jury trial. The parties' "silence" on this issue is of no moment; it is "too obvious to need expression." *Williston on Contracts* § 31:7.

In contrast, the decision whether to consent to class arbitration fundamentally alters the scope, the stakes, and the character of the parties' agreement to arbitrate. Class arbitration reflects a stark break from traditional arbitration, whereby a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors*, 473 U.S. at 628. Indeed, agreements to arbitrate often provide an attractive alternative to litigation because "streamlined proceedings and expeditious results will best serve [the parties'] needs" and will "keep the effort and expense required to resolve a dispute within manageable bounds." *Id.* at 633.

Imposition of class arbitration on a "silent" arbitration agreement undermines these well-established benefits of arbitration. As the California Supreme Court has recognized, class arbitration "entail[s] a greater degree of judicial involvement than is normally associated with arbitration," which is "ideally a complete proceeding, without resort to court facilities." *Keating*, 645 P.2d at 1209 (internal quotation marks omitted). Instead, class arbitration is a "hybrid" procedure that requires judicial intervention concerning "certification and notice to the class" and "external [court] supervision . . . to safeguard the rights of absent class members to adequate representation and in the event of dismissal

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the right to a civil jury trial is a fairly obvious consequence of failing to object to an arbitration clause and, therefore, does not require an express waiver") (internal quotation marks omitted).

or settlement." *Id.*; see also *Discover Bank*, 113 P.3d at 1106.

3. To be sure, parties to an agreement can, subject to due process constraints, expressly agree to arbitrate their disputes on a classwide basis. See *Volt*, 489 U.S. at 479. The question here, however, is whether a term compelling class arbitration can be added to a "silent" agreement on the assumption that (i) class arbitration is something the parties "must have intended" or (ii) the parties' agreement to class arbitration is "too obvious to need expression." Quite simply, it is unreasonable to make such an assumption about the parties' intent.

At the outset, the very concept of class arbitration is a relatively recent development. Although the FAA was enacted in 1925, the first serious analysis of class arbitration occurred more than 50 years later, when the California Court of Appeal addressed the question whether class arbitration was even possible and, if so, what sort of extraordinary protections courts would need to provide. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 38 (2000) (citing *Keating* v. *Superior Court*, 167 Cal. Rptr. 481 (Cal. Ct. App. 1980), *vacated*, 645 P.2d 1192 (Cal. 1982), *rev'd on other grounds sub nom. Southland Corp.* v. *Keating*, 465 U.S. 1, 16 (1984)). In light of this limited commercial history of class arbitration, including, until very recently, the lack of any guidance regarding how such an arbitration should actually proceed, it is highly unlikely that the parties to a "silent" arbitration agreement reasonably expected that they had

consented to class arbitration.[4] Moreover, it is exceedingly unlikely that the parties would have assumed that they could be compelled to submit to class arbitration absent an *express* agreement to do so because, before 2003, the overwhelming majority of courts to consider the issue had ruled that class arbitration could not be compelled in the face of a "silent" agreement. See Pet. 9-12 (citing cases).

Further, classwide arbitration imposes such significant burdens on the parties that it would be unreasonable to presume that they have agreed, *sub silentio*, to resolve disputes in a classwide proceeding before an arbitrator. In litigation, class actions under Federal Rule of Civil Procedure 23 "allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamasaki*, 442 U.S. 682, 700-01 (1979). By enabling a class representative to prosecute an action on behalf of absent class members, judicial class actions enable a court to issue an order that is binding on all members of the class. See *Hansberry* v. *Lee*, 311 U.S. 32, 40-41 (1940) (class actions are a "recognized exception" to the "principle of general application in Anglo-American

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[4] The American Arbitration Association ("AAA") did not publish rules addressing class arbitrations until 2003, after this Court's ruling in Bazzle. See AAA, Supplementary Rules for Class Arbitrations (effective date Oct. 8, 2003), *available at* http://www.adr.org/sp.asp?id=21936. The arbitration agreement at issue in this case, and the dispute that transpired under it, all predate the adoption of these rules. *See Stolt-Nielsen SA* v. *AnimalFeeds Int'l Corp.*, 548 F.3d 85, 87-88 (2d. Cir. 2008). After the district court held the dispute arbitrable, the parties agreed to be bound by AAA Supplementary Rules 3-7, which would then govern the arbitration panel's determination whether the arbitration agreement provided for class arbitration. *See id.*

jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process"). In so doing, judicial class actions protect defendants from the inconsistent obligations that might result from individual successive suits by each class member. See *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 402-03 (1980).

The defendant in a class arbitration brought by a single claimant under a "silent" arbitration agreement may not be afforded this same protection. Arbitration is a matter of contract, and "[i]t goes without saying that a contract cannot bind a nonparty." *Waffle House*, 534 U.S. at 294. Where each class member's contract expressly provides for class arbitration, each may be obligated to submit to binding class arbitration under the representation of another. But, where each contract is "silent" on the issue of class arbitration, the absent class members may very well argue that they did not consent to having their claims prosecuted by a class representative before arbitrators who were not selected in accordance with their individual contracts. *Cf. Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. at 52, 57 (1995) ("the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties").[5]

These concerns are compounded by the heightened stakes associated with the aggregation of hundreds or

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[5] Absent class members also might attempt to avoid the consequences of an adverse class-wide determination by arguing that the arbitration process did not provide them with sufficient due process protections to bind them to the results. *Cf. Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-12 (1985).

thousands of individual claims in a single proceeding. Class arbitration has the effect of "concentrating all of the risk of substantial damages awards in the hands of a single arbitrator." *Bazzle*, 539 U.S. at 459 (Rehnquist, C.J., dissenting). As such, the outcome of a single arbitration could have dramatic consequences for a defendant. In such a high-risk setting, effective appellate review is essential. Thus, in a judicial class action, the potential for enormous liability is tempered by a more liberal provision for interlocutory appeals that enables a party to seek an appeal not just from the final judgment, but also specifically the class certification decision. See Fed. R. Civ. P. 23(f).

Under the FAA, however, even if the parties to a class arbitration were permitted to take interlocutory appeals at various stages of the proceedings, the review under the FAA would remain limited in scope. Under this Court's decision last Term in *Hall St. Associates, L.L.C.* v. *Mattel, Inc.*, Sections 10 and 11 of the FAA contain the grounds for appealing an arbitral decision under that statute, and parties may not supplement those terms by contract. 128 S. Ct. at 1403. Thus, although an arbitral award may be vacated on grounds such as corruption, fraud, or misconduct, 9 U.S.C. § 10, "judicial scrutiny of arbitration awards necessarily is limited." *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987). Although this trade-off between efficiency and procedural protections might be attractive to a party expecting to deal with a single claim, the trade-off makes little, if any, practical sense when the outcome of a single arbitration has classwide consequences.

Likewise, it would be unreasonable in the extreme to assume that absent class members would have

consented to class arbitration absent an express provision in the parties' agreement. For absent class members to be bound by class proceedings, they must be afforded baseline procedural due process protections. See *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-12 (1985). Due process requires that the court supervise class representation to ensure that "the named plaintiff at all times adequately represent[s] the interests of the absent class members." *Id.* at 812 (citing *Hansberry*, 311 U.S. at 42-43, 45). In a class arbitration, however, the arbitrators are selected by the named parties, and the absent class members may legitimately object that the arbitrators were selected without any input from them. See Sternlight, *supra* at 113 ("it is difficult to see how such an arbitrator would play the role of the court in checking possible self-dealing").

Moreover, given the limited appellate review that the FAA affords – and that cannot be expanded even by the agreement of the parties, see *Hall St.*, 128 S. Ct. at 1403-05 – absent class members could be left in a situation in which the courts may be unable to correct errors in a decision by arbitrators they did not select and before whom their representation may not have been adequate. There is little reason to assume that absent class members would have consented to such treatment of their claims without saying so expressly in their agreement to arbitrate.[6]

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[6] Although the binding effect of class arbitration on absent class members is not settled, to be effective, class arbitration proceedings nonetheless must operate under the premise that their results will resolve issues on a class-wide basis. *See, e.g.*, AAA *supra*, R. 8(a)(3) ("The arbitrator may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable,

4. Even if a State's law would allow class arbitration to be superimposed on a "silent" agreement to arbitrate, the FAA requires that agreements to arbitrate be enforced in accordance with generally applicable contract principles. See *Perry*, 482 U.S. at 493 n.9 ("[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally") (emphasis in original); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995) (FAA's displacement of conflicting state law is "well-established").

In such instances, this Court has invalidated state laws that frustrated the parties' agreement to arbitrate. See, *e.g.*, *Preston* v. *Ferrer*, 128 S. Ct. 978, 981 (2008) (FAA supersedes state law requiring parties to a valid arbitration agreement instead to submit disputes under that statute to an administrative agency); *Doctor's Assocs.*, 517 U.S. at 683 (FAA supersedes state law invalidating arbitration agreements that are not noticed on the first page of a contract); *Perry* 482 U.S. at 491-92 (FAA supersedes state law providing that state law actions for the collection of wages may be maintained without regard to any arbitration agreement); *Southland Corp.* v. *Keating*, 465 U.S. 1, 16 (1984) (FAA supersedes state law requiring judicial consideration of claims brought pursuant to that statute regardless of parties' agreements to arbitrate).

Significantly, the FAA mandates displacement not only of rules that keep parties out of arbitration altogether, but also of arbitration-specific rules that

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and adequate."). Of course, without meaningful judicial scrutiny, the protections would be completely hollow.

allow arbitration to proceed, but superimpose terms to which the parties did not agree. See *Southland*, 465 U.S. at 13-14. Indeed, one of the problems that Congress sought to address in enacting the FAA was that state courts often would permit arbitration, but only pursuant to procedures supplied by state statute that did not accord with the parties' private agreements. See *id.* (citing Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong. 8 (1923)); see also *Scherk*, 417 U.S. at 519 (parties entitled to choose "the procedure to be used in resolving the dispute").

5. Finally, because generally applicable rules of contractual interpretation apply, the FAA does not permit "silence" to be treated as a license fundamentally to transform the parties' agreement into a class arbitration – whether that transformation is effected by a court or an arbitrator.

Prior to this Court's decision in Bazzle, the Court of Appeals for the Second Circuit (in addition to others) had held that the FAA prohibits a compelled class arbitration when the agreement is silent, and thus a district court is without power to compel class arbitration under such an agreement. *Government of U.K. of Gr. Brit.* v. *Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993); see also *Glencore, Ltd.* v. *Schnitzer Steel Prods. Co.*, F.3d 264, 268 (2d Cir. 1999). In the post-*Bazzle* decision below, however, the Second Circuit permitted a panel of arbitrators to do precisely what it held a district court could not do. *Stolt-Nielsen SA* v. *AnimalFeeds Int'l Grp.*, 548 F.3d 85, 99 (2d Cir. 2008). But *Bazzle*, as it was decided, was a case about the identity of the decision-maker, not the rule of decision. 539 U.S. at 452-53 (plurality opinion).

Changing the decision-maker from the court to the arbitrator does not affect the substantive rules to be

applied. See *McMahon*, 482 U.S. at 232 (arbitrators must "follow the law"); *Mitsubishi Motors*, 473 U.S. at 628 (a party to an arbitration "does not forego the substantive rights afforded by the statute"). That essential point is critical because, as noted, the FAA limits the grounds on which a court may overturn an arbitral decision. See *Hall Street*, 128 S. Ct. at 1403-05.

The proceedings below offer a perfect illustration. The Second Circuit misinterpreted *Bazzle* as muddying the clear law explained in *Boeing* and *Glencore*, and incorrectly held that *Bazzle* "abrogated these decisions to the extent that they read the FAA to prohibit" class arbitration on "silent" agreements. *Stolt-Nielsen*, 548 F.3d at 100. Having made this error, the court below ruled that it was obligated to defer to the arbitrators' determination. *Id.* at 99. Under this misreading of *Bazzle*, parties to arbitration agreements are faced with the prospect that arbitrators will impose class arbitrations based on inadequate decisional guidance and thus substitute coercion for consent, in violation of the core requirements of the FAA.

* * * *

Under the FAA, imposition of class arbitration in the face of a "silent" agreement is contrary to generally applicable contract standards, which prohibit agreements from being rewritten to add terms that the parties could have included, but did not. It is patently unreasonable to conclude that parties to an arbitration contract agreed to alter fundamentally the nature, the stakes, and the costs and benefits associated with traditional arbitration without ever saying so in their contracts.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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April 27, 2009

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 08-1198

IN THE

Supreme Court of the United States

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE SOCIETY OF MARITIME ARBITRATORS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the fact that an arbitration clause in a contract between two parties is silent about class arbitration imply that the parties have agreed to subject themselves to such proceedings?

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INTEREST OF THE *AMICUS CURIAE*

New York City has, since the early parts of the past century, been a central venue for maritime arbitrations and it is still one of the major centers for dispute resolution of maritime contracts.[1]

In order to promote sound and ethical standards for maritime arbitrations, a group of individuals, active as arbitrators, created the Society of Maritime Arbitrators ("SMA") in 1963 and today the majority of shipping-related arbitrations are decided by members of the SMA under the auspices of the SMA Rules. The SMA is a non-profit, professional organization with a membership of approximately 90 experienced shipping professionals from all walks of the industry. It maintains and publishes the SMA Arbitration Rules, the SMA Rules for Shortened Arbitration Procedure, the SMA Rules for Conciliation, Rules for Mediation, Rules for Recreational and Small Commercial Vessel Salvage Arbitration, and the SMA Code of Ethics. A particular feature of SMA arbitration is that unless the parties to the dispute agree not to, the awards rendered pursuant to the SMA Rules are published by the SMA Award Service to subscribers and also made available on Westlaw and Lexis/Nexis on the Internet. To date, more than 4,000 awards have been published. The SMA further

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or part, and no person other than the *amicus curiae* or its counsel made any monetary contribution to its preparation or submission. Additionally, the parties have consented to the filing of this brief, and their consent letters are on file with the Clerk of the Court. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief.

publishes "The Arbitrator," a newsletter with more than 1,500 readers worldwide. However, perhaps one of the most significant functions of the SMA is to organize workshops and seminars throughout the year in addition to hosting a monthly, open luncheon for members and shipping professionals featuring presentations on relevant topics.

The SMA does not administer or get involved in individual arbitrations conducted by its members or by non-member arbitrators in cases conducted under the SMA Rules. Appointments are personal and the members are free to handle and decide a case without any involvement by the SMA. However, as the leading organization in the United States dealing exclusively with maritime arbitration, the SMA is concerned that arbitration proceedings are conducted in accordance with rules and practices that are understood and recognized in the industry and that are not unduly ambiguous or unclear. The decision by the arbitration panel in the present case introduced a concept of class arbitration which was heretofore unknown in maritime arbitration. The SMA is concerned that the arbitration panel might have been misguided in its understanding of the law and supports Petitioners in their appeal to have this important legal issue clarified.

SUMMARY OF ARGUMENT

The underlying arbitration award in this case is the first where the class arbitration concept has been accepted in maritime arbitration in the United States, and the result was contrary to what has commonly been understood to be the position in the industry. Because of the truly international application of maritime contracts, and because arbitration is the preferred means of dispute resolution, it is of the utmost importance that the parties feel comfortable with the process. The panel's award in this case has created confusion with regard to the position under U.S. law, and the SMA supports

Petitioners' request for clarification as to whether class arbitrations are permitted under arbitration clauses that are silent on the matter.

ARGUMENT

I. Arbitration of Maritime Disputes

Arbitration is a time-honored concept for dispute resolution in maritime disputes and can be traced back to when the Phoenicians carried goods for Greek traders. The international nature of shipping and the particular rules, standards and terminology that have emerged in the business of transporting cargoes across the oceans lend themselves to commercial arbitration where the contractual parties refer their disputes to be decided by a peer. Efficiency, speed and finality in getting resolution to contract differences have always been valued by the shipping community and arbitration is still the preferred means of dispute resolution in maritime contracts.

II. Multi-Party Arbitrations

Maritime contracts are typically limited in time and space by the venture itself (to transport cargo or passengers from one port to another) and at the same time very fact-specific in that each contract is individually negotiated and agreed on the basis of the intended voyage. It is therefore rare that contractual disputes involve more than two parties. However, where a ship for example has been time chartered (sometimes multiple times) and voyage chartered by the (last) time charterer, a dispute may sometimes be germane to the two parties at the beginning and end of the charter party chain and thus have to be passed up or down the contract chain. Conscious of such scenarios and further bearing in mind the decision in *Gov't of U.K.* v. *Boeing Co.*, 998 F.2d 68 (2d Cir. 1993), which concluded that under the Federal

Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, express agreement between parties was required in order to consolidate arbitrations, the SMA specifically changed its Rules in 2003 to address this situation. A new section was added to the Rules to ensure that a right to consolidate arbitrations was preserved insofar as they "involve common questions of fact or law and/or arise in substantial part from the same maritime transactions or series of related transactions . . ." and further on the proviso that "all contracts incorporate SMA Rules."

III. The SMA and Class Arbitration

The question of potential class arbitrations under the SMA Rules has been brought up for discussion periodically, and the SMA Board of Governors has each time noted the total absence of a tradition for class arbitration in maritime disputes and has unanimously concluded that it generally sees no place for class arbitration in maritime disputes, except where the parties to contracts specifically have agreed to include this option and addressed the procedural implications in their arbitration clauses. It was therefore considered sufficiently implied in the SMA Rules that they did not apply to class action arbitrations so that no express statement to this effect was necessary.

Research has only brought up one award published by the SMA Award Service where "class arbitration" was referenced. *The LACERTA*, 2007 WL 5911099 (SMA No. 3983). The facts of the case were that a vessel was time chartered through a string of three separate time charters (from A to B and from B to C and from C to D). However, the charter party form was identical and contained the same arbitration clause calling for proceedings in accordance with the SMA Rules. A dispute arose under the time charter party between A and B, and arbitration proceedings started. The dispute did not continue down the chain of contracts, however. B specifically stated that it had no dispute with C

on the issue and no proceedings were commenced under that charter party or the charter party between C and D. Nevertheless, A (being the claimant in the arbitration) demanded consolidated arbitration with C and D, whom it believed had information essential to its dispute with B. B, C and D objected to any consolidation. In the majority's award, it rejected A's demand and, among the many reasons stated for doing so, the panel reasoned as follows: "Consolidation does not equate to the right of combining parties in subcharters to create the effect of a class action."

The recent Partial Final Clause Construction Award in the arbitration underlying *Stolt-Nielsen v. Animalfeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008), once again has brought the class arbitration issue on the agenda of the SMA Board of Governors. It was noted that the proceedings had been conducted in accordance with a specifically drafted arbitration agreement and also that the three arbitrators did not appear to have a maritime background. It was nevertheless concluded that it would seem prudent for the SMA to remove any doubt or ambiguity as to the role of any potential class arbitration for maritime disputes insofar as the SMA was concerned by adding a specific provision prohibiting such proceedings under the SMA Rules. To this end, Section 2 of the SMA Rules was amended by the following addition to the paragraph addressing consolidation of arbitrations: "However, claims on behalf of or against a class are prohibited from being submitted to arbitration under these Rules."

On this basis, the SMA concludes that it is clear that Respondent would not have been successful in bringing a class arbitration action under the current SMA Rules, but we are equally confident that the result would have been the same before the recent clarification of the SMA Rules.

As far as we are aware, the only actions where the class-action concept is recognized in shipping, is for Court-administered limitation proceedings following a maritime disaster. However, these are proceedings regulated by statutes contained in 46 U.S.C. §§ 30501-12.

CONCLUSION

By holding — contrary to what was widely understood to be acceptable in the maritime industry — that class arbitration proceedings are allowed under standard arbitration clauses widely employed in the maritime industry both in the United States and internationally, the arbitration panel's decision in the present case creates uncertainty and ambiguity, and the SMA as *amicus curiae* supports Petitioners' request for clarification.

Respectfully submitted.

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JOINT APPENDIX

No. 08-1198

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

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ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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U.S. District Court[1]
United States District Court for the
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:06-cv-00420-JSR

Date Filed	#	Docket Text
01/20/2006	1	MOTION to file Confidential Arbitration Materials under seal. * * * Document filed by Odfjell USA, Inc., Jo Tankers BV, Jo Tankers, Inc., Tokyo Marine Co., Ltd., Stolt-Nielsen SA, Stolt-Nielsen Transportation Group, Ltd., Odfjell ASA, Odfjell Seachem AS. Modified on 1/24/2006. (Entered: 01/24/2006)
01/20/2006	2	ORDER: * * * [I]t is hereby ordered that the Petition, its supporting exhibits, and the Memorandum of Law in Support of Petition be sealed from public view. (Entered: 01/24/2006)
		* * *
03/08/2006		* * *An oral argument, on motion to vacate arbitrater's [sic] award, was held in this action. (Entered: 03/14/2006)
		* * *

[1] Docket entries edited for clarity.

06/27/2006	36	OPINION & ORDER that the Partial Final Clause Construction Award is hereby vacated, and the case is remanded to the Panel for proceedings consistent with this Opinion and Order. (Entered: 06/27/2006)

* * *

07/05/2006	43	ORDER that the Clerk is directed to enter final judgment vacating the Partial Final Clause Construction Award dated 12/20/05, and to close the case. (Entered: 07/05/2006)
07/05/2006	44	CLERK'S JUDGMENT That for the reasons stated in the Court's Order dated June 26, 2006, the Partial Final Clause Construction Award dated December 20, 2005 is vacated and the case is remanded to the Panel for proceedings consistent with the Opinion and Order dated June 26, 2006; accordingly, the case is closed. (Entered: 07/05/2006)
07/24/2006	45	NOTICE OF APPEAL from Clerk's Judgment. Document filed by AnimalFeeds International Corp. on behalf of itself and all others similarly situated. (Entered: 07/25/2006)

* * *

01/21/2009	47	* * * MANDATE of USCA (Certified Copy) as to Notice of Appeal filed by AnimalFeeds International Corp. USCA Case Number 06-3474-cv. It is Ordered, Adjudged and Decreed that the judgment of the District Court is REVERSED and the cause REMANDED to the district court with instructions to deny the petition to vacate. (Entered: 01/21/2009)
02/03/2009	48	ORDER of USCA (Certified Copy) as to Notice of Appeal filed by AnimalFeeds International Corp. IT IS HEREBY ORDERED that the motion by Appellees to recall the mandate in light of the reason for late filing of the motion for a stay is GRANTED. IT IS FURTHER ORDERED that the motion for stay is GRANTED for two weeks from the date of this order and to permit movant to seek a further stay in the United States Supreme Court. (Entered: 02/04/2009)

03/02/2009	49	MANDATE of USCA (Certified Copy) as to Notice of Appeal filed by AnimalFeeds International Corp. USCA Case Number 06-3474-cv. Ordered, Adjudged and Decreed that the judgment of the District Court is REVERSED and the cause REMANDED to the district court with instructions to deny the petition to vacate. (Entered: 03/02/2009)
06/09/2009	50	ORDER: Accordingly, the Court hereby denies the petition to vacate the arbitral judgment and directs the Clerk of the Court to close the case. SO ORDERED. (Entered: 06/10/2009)
06/15/2009	51	CLERK'S JUDGMENT in favor of AnimalFeeds International Corp., KP Chemical Corp. against Jo Tankers BV, Jo Tankers, Inc., Odfjell ASA, Odfjell Seachem AS, Odfjell USA, Inc., Stolt-Nielsen SA, Stolt-Nielsen Transportation Group, Ltd., Tokyo Marine Co., Ltd. that for the reasons stated in the Court's Oder of June 4, 2009, petitioner's motion to vacate the arbitral award is denied and the case is closed. (Entered: 06/15/2009)

General Docket[1]
US Court of Appeals for the Second Circuit
Court of Appeals Docket #: 06-3474-cv

07/26/2006	Copy of notice of appeal and district court docket entries on behalf of APPELLANT AnimalFeeds International Corp., filed. (Entry date 08/03/06)
	* * *
09/12/2006	APPELLANT AnimalFeeds International Corp., brief FILED with proof of service. (Entry date 09/14/06)
09/12/2006	APPELLANT AnimalFeeds International Corp., joint appendix filed w/pfs. * * * (Entry date 09/14/06)
09/12/2006	APPELLANT AnimalFeeds International Corp., sealed appendix filed w/pfs. (Entry date 09/14/06)
	* * *
10/13/2006	APPELLEE Jo Tankers BV, Jo Tankers, Inc., Odfjell ASA, Odfjell USA, Inc., ET AL, brief filed with proof of service. (Entry date 10/17/06)
	* * *
10/24/2006	APPELLEE Jo Tankers BV, Jo Tankers, Inc., Odfjell ASA, Odfjell USA, Inc., ET AL, supplemental appendix filed with proof of service. (Entry date 10/26/06)

[1] Docket entries edited for clarity.

* * *

10/26/2006	APPELLANT AnimalFeeds International Corp., reply brief filed with proof of service. (Entry date 10/30/06)

* * *

05/30/2008	Case heard before KEARSE, SACK, LIVINGSTON, CJJ. (Entry date 05/30/08)

* * *

11/04/2008	Judgment of the district court is Reversed and Remanded with instructions to deny the petition to vacate by published signed opinion filed. (Entry date 11/04/08)

* * *

11/18/2008	Appellee Jo Tankers BV, Appellee Jo Tankers, Inc., Appellee Odfjell ASA, et al Petition for rehearing and petition for rehearing en banc filed with proof of service. (Entry date 11/19/08)

* * *

01/12/2009	Order FILED DENYING Petition for rehearing [and] * * * petition for rehearing en banc by Appellee Stolt Parcel Tankers Inc., Appellee Stolt-Nielsen Transportation Group Ltd., Appellee Odfjell ASA, Appellee Odfjell USA, Inc., Appellee Jo Tankers BV, Appellee Jo Tankers, Inc., Appellee Tokyo Marine Co. Ltd. (Entry date 01/12/09)

* * *

01/20/2009	Judgment MANDATE ISSUED. CLOSED (Entry date 01/20/09)

* * *

01/21/2009	Appellee Jo Tankers BV, Appellee Jo Tankers, Inc., Appellee Odfjell ASA, et al motion to stay the mandate pending the filing of a writ of certiorari, to accept the motion to stay as out of time and to recall the mandate filed with proof of service. (Entry date 01/23/09)

* * *

02/02/2009	Order[:] * * * "IT IS HEREBY ORDERED that the motion by Appellees to recall the mandate in light of the reason for late filing of the motion for stay is GRANTED. IT IS FURTHER ORDERED that the motion for stay is GRANTED for two weeks from the date of this order and to permit movant to seek a further stay in the United States Supreme Court." (Entry date 02/02/09)

* * *

02/26/2009	Order filed stating: "IT IS HEREBY ORDERED that the Appellees' request for a further stay of the mandate is DENIED. The mandate shall issue forthwith." (Entry date 02/26/09)

* * *

02/26/2009	Judgment MANDATE ISSUED. CLOSED (Entry date 02/26/09)

* * *

06/19/2009	Writ of Certiorari GRANTED. (Entry date 06/22/09)
08/25/2009	ORDER FILED recalling mandate. "A mandate having issued on 02/26/09 in the above captioned matter, and a petition for a writ of certiorari having been filed in the United States Supreme Court on 03/26/09, and writ of certiorari having been granted on 06/15/09, IT IS HEREBY ORDERED that the mandate in this case is recalled, restoring jurisdiction to this Court." (Entry date 08/25/09)
08/25/2009	Letter sent to district court recalling mandate. (Entry date 08/25/09)

[CAJA A2094-A2108]

TANKER CHARTER PARTIES

FORM NO. 17-18

VEGOILVOY

Tanker Voyage Charter Party
(Adopted January 27, 1950)

PREAMBLE

Charter Party made as of _____, 19___ at _____ by and between _____ (hereinafter called the "Owner") of the good _____ MS/SS _____ (hereinafter called "Vessel") and _____ Charterer (hereinafter called the "Charterer").

The Vessel shall receive from the Charterer or supplier at the port or ports of loading, or so near thereto as she may safely get, always afloat, the cargo described in Part I, for delivery as ordered on signing bills of lading to the port or ports of discharge, or so near thereto as she may safely get always afloat; and there discharge the cargo; all subject to the terms, provisions, exceptions and limitations contained or incorporated in this Charter Party, which shall include the foregoing preamble and Parts I and II. In the event of a conflict, the provisions of Part I shall prevail over those contained in Part II to the extent of such conflict.

Each of the provisions of this Charter Party shall be and be deemed severable, and if any provision or part of any provision should be held invalid, illegal or unenforceable, the remaining provisions or part or parts of any provisions shall continue in full force and effect.

PART I

A. Description and Position of Vessel. _____ Net Registered Tonnage: _____ total Deadweight: _____ tons of 2,240 lbs. each on _____ draft in salt water on assigned summer freeboard. Capacity for cargo: _____ bbls. of 42 American gallons each at 60°F. or _____ tons of 2,240 lbs. each (10% more or less, Vessel's option). Classed: _____ Now: _____.

B. Part—Full Cargo. _____ If this Charter Party is for a full cargo, then it shall be the quantity the Vessel can carry if loaded to her minimum permissible freeboard for the voyage, but not exceeding what the Vessel can, in the Master's judgment, reasonably stow and carry over and above her tackle, apparel, stores, and furniture, sufficient space to be left in the expansion tanks to provide for the expansion of the cargo. In no event shall Charterer be required to furnish cargo in excess of the quantity stated as the Vessel's capacity for cargo plus 10% of that quantity. If less than a full cargo is to be carried, the quantity stated shall be the minimum quantity which the Charterer is required to supply.

C. Loading Port. _____ Readiness Date: _____ Cancelling Date: _____

D. Discharging Port. _____

E. Total Laytime _____ for loading; _____ for discharging (Running Hours.)

F. Freight Rate. _____ Freight Payable at: _____

G. Demurrage per Hour. _____

H. Special Provisions. _____

PART II

1. Warranty. (a) The Owner shall, before and at the commencement of the voyage, exercise due diligence to make the Vessel seaworthy, properly manned, equipped, and supplied for and during the voyage, and to make the pipes, pumps, and heater coils tight, staunch, and strong, in every respect fit for the voyage, and to make the tanks, holds, and other spaces in which cargo is carried fit and safe for its carriage and preservation.

(b) It is understood that if the tank or tanks, into which the particular cargo covered by this Charter is to be placed, upon testing prove to be defective the Owner undertakes to execute the necessary repairs, provided repairs can be effected within 24 hours and at reasonable expense; otherwise, Owner has the option of cancelling this Charter in which case no responsibility shall rest with the Vessel, Owners, or Agents.

2. Time for Readiness of Cargo. Charterer warrants that the cargo shall be available for loading at the designated loading port upon arrival of the Vessel within the Readiness and Cancelling date shown in Part I hereof. Any delay suffered by the Vessel for failure to conform to this warranty shall count as used lay time.

3. Readiness and Cancelling Date. Laytime shall not commence before the readiness date named in Part I, unless otherwise provided in this Charter, or unless the Charterer accepts a notice of readiness or orders or permits the Vessel to berth before that date, or otherwise waives the provisions of this paragraph. If the Vessel is not ready to load by 4.00 p.m. (local time) on the canceling date named in Part I, the Charterer shall have the option of cancelling this Charter by giving the

Owner notice of such cancellation within twenty-four (24) hours after the cancelling date; otherwise this Charter shall remain in full force and effect. The Charterer may in its notice of cancellation specify that it will nevertheless accept the Vessel if she is ready to load on or before a date or time that Charterer may designate in such notice in which event the Owner may at its option either treat this Charter Party as cancelled or tender the Vessel on or before the date named by the Charterer in its notice, whereupon this Charter shall remain in full force and effect.

4. Notice of Readiness and Commencement of Laytime. (a) When the Vessel has arrived at the port of loading or discharge and is ready to load or discharge, a notice of readiness shall be tendered to the Charterer or its agent by the Master or Agent by letter, telegraph, wireless or telephone. The Vessel shall be deemed ready within the meaning of this clause whether she arrives during or outside of usual business hours, whether she is in or out of berth or whether or not she has ballast water or slops in her tanks. Laytime shall commence either at the expiration of six (6) running hours after tender of notice of readiness. Vessel in or out of berth, except that any delay to the Vessel in reaching her berth caused by the fault of the Vessel or Owner shall not count as used laytime; or immediately upon the Vessel's arrival in berth (i.e. finished mooring when at a sealoading or discharging terminal and all fast when loading or discharging alongside a wharf) with or without notice of readiness, whichever first occurs.

(b) Notwithstanding anything contained in paragraph (a) of this clause, laytime shall commence when the Vessel arrives at the loading or discharging port, whether or not berth is available; provided that notice

of readiness shall always be tendered as therein stipulated.

5. Laytime. (a) The number of running hours specified as laytime in Part I shall be permitted the Charterer for loading, discharging, and used laytime; but any delay due to breakdown or inability of the Vessel's facilities to load or discharge the cargo within the time allowed shall not count as used laytime. If regulations of the Owner prohibit loading or discharging of the cargo at night, time so lost shall not count as used laytime; if the Charterer, shipper or consignee, or the port authorities prohibit loading or discharging at night, time so lost shall count as used laytime. The Vessel shall have the right to sail from all ports immediately upon the completion of loading or discharging whether or not laytime has expired.

(b) Where commingled shipments, or separate shipments, are loaded or discharged concurrently at the same installation, the laytime allowed to each shipper shall be the gross number of hours allowed any of the commingled or separate shipments, it being conclusively presumed that loading and discharging of all such shipments shall commence simultaneously.

6. Safe Berth. Shifting. (a) If under Part I hereof the Charterer is given the right to name the loading and discharging berth, the Vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided that the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer.

(b) If under Part I hereof the Charterer is given the right to load or discharge at more than one berth,

the Charterer shall arrange with the agent of the Vessel for shifting the Vessel at ports of loading and/or discharge from one safe berth to another on payment of all towage and pilotage shifting to the next berth, charges for running lines on arrival at and leaving that berth, wharfage and dockage charges at that berth, additional agency charges and expense. Customs overtime and fees, and any other extra port charges or port expenses incurred by reason of using more than one berth. Time lost to the Vessel on account of shifting shall count as used laytime.

(c) Notwithstanding anything contained in paragraphs (a) and (b) of this clause, the Charterer warrants that the cargo shall be discharged at the ports and berths specified in Part I. Any change in loading or discharging ports or berths shall be made only as the result of special agreement in writing between Charterer and Owner, and in such case, Charterer shall assume all cost incident to such change, including the value of the vessel's time if the voyage is prolonged thereby.

(d) Lighterage. Lighterage at port of loading shall be at the risk and expense of Charterer. The Charterer shall deliver cargo to alongside Vessel as instructed by Owner, and the Owner shall provide a berth immediately alongside the Vessel for the barge or barges carrying the cargo after which pumping shall commence and proceed continuously.

7. Pumping in and out. Hoses. (a) The cargo shall be pumped into the Vessel at the expense, risk and peril of the Charterer, and shall be pumped out of the Vessel at the expense of the Vessel, but at the risk and peril of the Vessel only so far as the Vessel's permanent hose connections, where delivery of the cargo shall

be taken by the Charterer or consignee. The Vessel shall furnish her pumps and the necessary steam for discharging in all ports where the regulations permit of fire on board, as well as necessary hands. Should regulations not permit fires on board, the Charterer or consignee shall supply, at its expense, all steam necessary for discharging as well as loading, but the Owner shall pay for steam supplied to the Vessel for all other purposes. If cargo is loaded from lighters, the Vessel, if permitted to have fires on board, shall, if required, furnish steam to lighters at Charterer's expense for pumping cargo into the Vessel.

(b) Hoses—All hose (suitable to fit Vessel's connection) and other necessary equipment and labor to accomplish delivery of cargo to be provided by Charterer at Charterer's risk and expense.

(c) Stevedoring—If stevedoring is required, it is to be arranged and paid for by the Charterer.

(d) Steam—Vessel to furnish steam at its expense for the operation of receiver's pumps at port of discharge.

(e) Squeegeeing—Squeegeeing to be paid by the Owner and time used is not to count as used laytime.

(f) When shipments are commingled before loading—The cargo to be carried pursuant to this Charter Party has been or will be commingled with cargo belonging to other Charterers prior to loading, and will be loaded into the tanks of the Vessel without separation or identification. Neither the Vessel not [sic] Owner assumes any responsibility for the consequences of such commingling, nor for separation of the several consignments at the time of delivery. The Vessel undertakes to deliver only that proportion of the cargo actu-

ally loaded in the designated tanks which is represented by the percentage that the amount specified in the Bill of Lading issued for the cargo covered by this Charter Party bears to the total of the commingled shipments delivered at destination.

(g) When shipments are to be commingled upon loading in the tanks of a vessel—It is understood that the Vessel will carry cargoes supplied by other Charterers to be carried subject to the terms of substantially similar part-cargo charter parties. Where the products are similar, the Vessel shall have the right to commingle such products in the tanks of the Vessel, in which case the Vessel undertakes to deliver only that proportion of the cargo actually loaded in the designated tanks which is represented by the percentage that the total amount specified in the bill of lading bears to the total of the commingled shipments delivered at destination. Neither the Vessel nor Owner assumes any responsibility for the consequences of such commingling, nor for the separation thereof at the time of delivery.

(h) Unless notation or exception is made in writing on the bill of lading, or other shipping document before departure of the vessel from the dock or place at which the said cargo is delivered, receipt of the cargo shall be deemed prima facie evidence of right delivery of the entire cargo as described in the bill of lading; further, that upon failure or refusal by the Charterer or its representative to execute or except to the ullage reports prepared by the vessel, the figures stated in said ullage reports shall be deemed prima facie correct and binding upon the parties hereto.

8. Products Excluded. Flashpoint. (a) No product shall be shipped which fails to meet one or the other of

the two following requirements: (1) The vapor pressure at one hundred degrees Fahrenheit (100° F.) shall not exceed thirteen pounds (13 lbs.) as determined by the A.S.T.M. Method (Reid Method) identified as D-323 current at the time shipment is made. (2) The distillation loss shall not exceed four per cent (4%) and the sum of the distillation loss and the distillate collected in the receiving graduate shall not exceed ten per cent (10%) when the thermometer reads one hundred twenty-two degrees Fahrenheit (122° F.). Note.–The distillation test shall be made by A.S.T.M. Method identified as D-86 current at the time shipment is made. When products other than Naphtha or Gasoline are tested, the distillation loss may be determined by distilling not less than twenty-five per cent (25%) and deducting from one hundred per cent (100%) the sum of the volumes of the distillate and the residue in the flask (cooled to a temperature of sixty degrees Fahrenheit (60° F.)).

(b) No petroleum or its products having a flash-point under 150° Fahrenheit (Closed Cup Abel Test) shall be loaded from lighters but this clause shall not restrict the Charterer from loading or topping off crude oil from vessels or barges inside or outside the bar at any port or place where bar conditions exist.

9. Freight. (a) Full freight to the discharging port named in Part I or declared by the Charterer in accordance with this Charter shall be completely earned on all cargo as loaded and the Owner shall be entitled to receive and retain such freight irrevocably under all circumstances whatsoever ship and/or cargo lost or not lost, whether or not the cargo is damaged or unsound, or in the event the voyage is abandoned or broken up.

(b) The freight shall be at the rate stipulated or incorporated in Part I based on the intake quantity as shown by the Inspector's Certificate of Inspection, the services of the Inspector to be arranged and paid for by the Charterer who shall furnish the Owner's Agent with a copy of the Inspector's Certificate.

(c) Freight, less any advances made to the Master at the port or ports of loading, shall, unless otherwise agreed in Part I, be paid in full without discount in United States currency to the Owner's Agent at the Agent's place of business upon receipt by the Agent of figures indicating the quantity of cargo loaded as provided in sub-paragraph (b) above. No deduction in freight shall be made for water and/or sediment contained in the oil.

10. Deadfreight. Charterer will load as much oil as, in the opinion of the Master is required to fill the tank or tanks (whether such quantity be less than or in excess of the tonnage stated in Part I hereof), failing which Charterer shall pay deadfreight on the quantity short of Master's requirements, or if, as a result of the Charterer's failure to deliver on board the quantity required by the Master, there is in the tank or tanks not sufficient to render it, in the opinion of the Master, safe for the voyage, he shall be at liberty to require Charterer to remove the oil loaded at Charterer's expense and risk and Charterer agrees to pay deadfreight at the rate per ton stipulated in Part I hereof on the full oil capacity of the tank or tanks.

11. Demurrage. (a) Charterer shall pay demurrage per running hour and pro rata for a part thereof at the rate stipulated in Part I for all time that loading and discharging and used laytime as elsewhere herein provided exceeds the allowed laytime herein specified.

If, however, demurrage shall be incurred at ports of loading and/or discharge because of fire or explosion in or about the plant, or because of breakdown of machinery or loading or discharging facilities of the Charterer, shipper or consignee of the cargo, the rate of demurrage shall be reduced to one-half the rate stipulated in Part I hereof per running hour and pro rata of such reduced rate for part of an hour for demurrage so incurred.

(b) Where commingled or separate shipments are loaded or discharged at the same installation, demurrage shall be apportioned among such shipments in proportion to the ratio which each bears to the aggregate thereof; provided, however, that where the cause of the delay results from the act of any specific charterer or shipper, the total demurrage on the vessel shall be charged against such charterer or shipper and such shipment.

(c) Dispatch—No dispatch money shall be payable under this Charter Party.

12. Dues, Wharfage, Taxes. The vessel shall be free of any wharfare, dockage, quay dues or similar charges at all loading and discharging ports. Entrance and clearance fees whether measured by the volume of cargo or not, towing and tug charges, pilotage, dues, and other usual port charges on the Vessel shall be paid by the Owner. All other dues, taxes, assessments, and charges on the cargo shall be paid by the Charterer including but without limitation any habilitation tax, Customs overtime, taxes on freight at loading or discharging ports as well as any unusual taxes, assessments or governmental charges whether in effect at present or whether imposed on the Vessel or freight in the future

and whether or not measured by the volume of the cargo, shall be paid by the Charterer.

13. Ice. The Vessel shall not be ordered to or bound to enter any ice-bound port or place or any place where lights, lightships, marks or buoys on Vessel's arrival are or are likely to be withdrawn by reason of ice or where there is risk that ordinarily the Vessel will not be able on account of ice to enter, reach or leave the place. The Vessel shall not be obliged to force ice. If on account of ice the Master considers it dangerous to enter or remain at any loading or discharging place for fear of the Vessel being frozen in and/or damaged, he shall have the liberty to sail to another place or port which is free from ice and at which there are facilities for loading or discharging cargo and there await Charterer's further instructions. The whole of the time occupied from the time the Vessel is diverted by reason of ice or other conditions until her arrival at an ice-free port as well as any detention by reason of ice or any of the above causes shall be paid for by the Charterer at the demurrage rate stipulated in Part I.

14. Quarantine. (a) Should the Charterers send the Vessel to any port or place where a quarantine exists, any delay thereby caused to the Vessel shall count as used laytime; but should the quarantine not be declared until the Vessel is on passage to such port, the Charterer shall not be liable for any resulting delay. The Owner shall be entitled to all the liberties specified in Clause 29.

(b) If the Vessel, prior to or after entering upon this Charter, has docked or docks at any wharf which is not rat-free or stegomyia-free, she shall before proceeding to a rat-free or stegomyia-free wharf, be fumigated by the Owner at his expense, except that if the

Charterer ordered the Vessel to the infected wharf he shall bear the expense of fumigation.

15. Cleaning. Prior to loading. Charterer shall inspect the designated tanks for the purpose of determining that they are in suitable condition for the loading and carriage of the cargo specified hereunder. Acceptance of the tanks by Charterer's representative shall be conclusive as to their suitability for such purposes. If Charterer's representative does not accept the tanks as suitable for the cargo, the Owner shall have the right, as its option, to cancel this Charter Party, without any resulting liability on the part of either party, or to again clean the tanks, subject to inspection as above.

16. Heating. (a) If heating of the cargo is requested by the Charterer, the Owner shall exercise due diligence to maintain the temperature requested. Notwithstanding any other provisions herein the Owner shall not be responsible if such temperatures are not maintained by reason of any cause beyond the Owner's control and the laytime and demurrage provisions herein shall remain in full force and effect. The burden of proving the failure to exercise due diligence shall be on the Charterer or person claiming damage or other relief. Whenever the Owner's failure to maintain temperatures is excused under this or any other provision of this Charter, Charterer shall assume all risks of delay during discharge due to the nature or condition of the cargo and shall pay demurrage if any.

(b) Unless agreed to in writing by Owner, the Vessel is not under any obligation to heat the cargo, but Owner reserves the right to heat the cargo to facilitate discharge.

(c) If Charterer decides that heat ought to be applied to the cargo, Charterer's instructions to Owner

will be in the following form: "Please instruct the master _____ hours before arrival at discharge port to apply heat to cargo so that on arrival at discharge port the temperature about two feet above the coils shall be about _____ degrees Fahrenheit and to maintain approximately that temperature during discharge."

17. General Exceptions Clause. (a) Neither the Vessel nor the Master or Owner shall be or shall be held liable for any loss of or damage or delay to the cargo or for any failure in performing hereunder arising or resulting from:—Any act, neglect or default of the Master, pilots, mariners or other servants of the Owner in the navigation or management of the Vessel; barratry; fire, unless caused by the personal design or neglect of the Owner; collision; stranding; perils, dangers or accidents of the seas or other navigable waters; saving or attempting to save life or property; wastage in weight or bulk or any loss or damage arising from inherent defect, quality or vice of the cargo; any act or omission of the Charterer, shipper, consignee, owner of the goods or holder of the bill of lading, their agents and representatives; insufficiency of packing; insufficiency or inadequacy of marks; explosion, bursting of boilers, breakage of shafts or any latent defect in hull, machinery, equipment or appurtenances; unseaworthiness of the Vessel whether existing at the beginning of the voyage or developing during the voyage unless caused by want of due diligence on the part of the Owner to make the Vessel seaworthy or to have her properly manned, equipped, and supplied; leakage; shrinkage; evaporation; change in quality of the cargo; handling or transportation losses; difference between actual or reported intake and outturn quantities; stowage or contact with or leakage from other cargo; discol-

oration; contamination; deterioration; any consequence arising out of shipping more than one grade of cargo; or from any other cause arising without the actual fault or privity of the Owner. And neither the Vessel, her Master or Owner, nor the Charterer shall, unless otherwise in this Charter expressly provided, be responsible for any loss of or damage or delay to or failure to discharge or deliver the cargo arising or resulting from:—Act of God; act of war; act of public enemies, pirates or assailing thieves; arrest or restraint of princes, rulers or people; seizure under legal process provided bond is promptly furnished to release the Vessel or cargo; strikes, lockouts, stoppage or restraint of labor from whatever cause whether partial or general; or riot or civil commotion. No exemption afforded the Charterer under this clause shall relieve the Charterer of or diminish its obligations for payment of any sums due the Owner under other provisions of this Charter.

(b) The tanks having been inspected by the Charterer's inspector as to tightness and cleanliness, notwithstanding any other provision of this Charter, neither the Vessel nor the Owner shall be liable for loss or damage due to contamination, deterioration, discoloration or change in quality or characteristics, or leakage, unless there is negligence on the part of the Vessel.

18. Jason Clause. In the event of accident, danger, damage, or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which the Owner is not responsible by statute, contract, or otherwise, the cargo, shippers, consignees, or owners of the cargo shall contribute with the Owner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay sal-

vage and special charges incurred in respect of the cargo. If a salving ship is owned or operated by the Owner, salvage shall be paid for as fully as if the salving ship or ships belong to strangers.

19. Both To Blame Collision Clause. If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners insofar as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier. The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect to a collision or contact.

20. General Average. General average shall be adjusted, stated and settled, according to York-Antwerp Rules 1950, at such port or place in the United States as may be selected by the Owner, and as to matters not provided for by these Rules, according to the laws and usages at the port of New York. In such adjustment, disbursement in foreign currencies shall be exchanged into United States money at the rate prevailing on the dates made and allowances for damage to cargo claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship.

Average agreement or bond and such additional security, as may be required by the Owner, must be furnished before delivery of the cargo. Such cash deposit as the Owner or his agents may deem sufficient as additional security for the contribution of the cargo and for any salvage and special charges thereon, shall, if required, be made by the cargo, shippers, consignees or owners of the cargo to the Owner before delivery. Such deposit shall, at the option of the Owner, be payable in United States money, and be remitted to the adjuster. When so remitted the deposit shall be held in a special account at the place of adjustment in the name of the adjuster pending settlement of the general average and refunds or credit balances, if any, shall be paid in United States money.

21. Deviation Clause. The Vesel [sic] shall have liberty to call at any ports in any order, to sail with or without pilots, to tow or to be towed, to go to the assistance of vessels in distress, to deviate for the purpose of saving life or property or of landing any ill or injured person on board, and to call for fuel or stores at any port or ports in or out of the regular course of the voyage. Any salvage shall be for the sole benefit of the Owner.

22. Other Ports. If this Charter Party is for a part cargo:—(a) Owner has the right, either before or after loading cargo covered by this Charter Party, to load or discharge cargo belonging to the Charterer or others in any ports, rotation of ports to be at Owner's option; (b) Owner has privilege of discharging the cargo covered by this Charter Party at any port and to tranship it at Owner's risk and expense by any vessel or other means of transportation by water, or by rail, to the destination shown in Part I of this Charter Party.

23. Limitation of Liability. (a) Any provision of this Charter to the contrary notwithstanding, the Owner shall have the benefit of all limitations of, and exemptions from, liability accorded to the owner or chartered owner of vessels by any statute or rule of law for the time being in force. Nothing in this charter shall operate to limit or deprive the Owner of any statutory exceptions or limitations of liability on the theory of personal contract or otherwise.

(b) The Owner and the Vessel in all matters arising under this Charter Party or any bill of lading issued hereunder shall be entitled to the like privileges, rights, and immunities as are contained in Sections 3 (6), 4, and 11 of the Carriage of Goods by Sea Act of the United States approved April 16, 1936.

(c) Neither the Vessel or Owner, nor any corporation owned by, subsidiary to or associated or affiliated with the Vessel or Owner shall be liable to answer for or make good any loss or damage to the cargo occurring at any time and even though before loading on or after discharge from the Vessel, by reason or by means of any fire whatsoever, unless such fire shall be caused by the Owner's design or neglect.

24. Bills of Lading. Bills of Lading in the form appearing below for cargo shipped shall be signed by the Master or Agent as requested. Any bill of lading signed by the Master or Agent of the Owner shall be without prejudice to the terms, conditions and exceptions of this Charter and shall be subject to all such terms, conditions and exceptions. The Charterer shall indemnify the Owner, the Master, and the Vessel from all consequences or liabilities that may arise from the Charterer or its agents or the Master or Vessel's agents signing bills of lading or other documents incon-

sistent with this Charter or from any irregularity in papers supplied by the Charterer or its agents, or from complying with any orders of the Charterer or its agents.

25. Lien. The Owner shall have an absolute lien on the cargo for all freight, dead freight, demurrage and costs, including attorney's fees, of recovering the same, which lien shall continue after delivery of the cargo into the possession of the Charterer, or of the holders of any bills of lading covering the same, or of any storageman.

26. Agents. The Owner shall appoint Vessel's agents at all ports.

27. Substitution. Owner has option to substitute another vessel provided she can report within the readiness and cancelling dates, and is suitable for the cargo, shown in Part I hereof.

28. Assignment. Subject to the approval of Owner, the Charterer shall have the option of subletting or assigning this Charter to any individual or company, but the Charterer shall always remain responsible for the due fulfillment of this Charter in all its terms and conditions.

29. Liberty Clauses. (a) In any situation whatsoever and wheresoever occurring and whether existing or anticipated before commencement of or during the voyage, which in the judgment of the Owner or Master is likely to give rise to risk of capture, seizure, detention, damage, delay or disadvantage to or loss of the Vessel or any part of her cargo, or to make it unsafe, imprudent, or unlawful for any reason to commence or proceed on or continue the voyage or to enter or discharge the cargo at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leav-

ing the port of discharge or the usual place of discharge in such port, the Owner may before loading or before the commencement of the voyage, require the shipper or other person entitled thereto to take delivery of the cargo at port of shipment and upon their failure to do so, may warehouse the cargo at the risk and expense of the cargo; or the Owner or Master, whether or not proceeding toward or entering or attempting to enter the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the cargo there, may discharge the cargo into depot, lazaretto, craft or other place; or the Vessel may proceed or return, directly or indirectly, to or stop at any such port or place whatsoever as the Master or the Owner may consider safe or advisable under the circumstances, and discharge the cargo, or any part thereof, at any such port or place; or the Owner or the Master may retain the cargo on board until the return trip or until such time as the Owner or the Master thinks advisable and discharge the cargo at any place whatsoever as herein provided or the Owner or the Master may discharge and forward the cargo by any means at the risk and expense of the cargo. The Owner may, when practicable, have the Vessel call and discharge the cargo at another or substitute port declared or requested by the Charterer. The Owner or the Master is not required to give notice of discharge of the cargo, or the forwarding thereof as herein provided. When the cargo is discharged from the Vessel, as herein provided, it shall be at its own risk and expense; such discharge shall constitute complete delivery and performance under this contract and the Owner shall be freed from any further responsibility. For any service rendered to the cargo as herein provided the

Owner shall be entitled to a reasonable extra compensation.

(b) The Owner, Master and Vessel shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppage, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the Vessel, the right to give such orders or directions. Delivery or other disposition of the cargo in accordance with such order or directions shall be a fulfillment of the contract voyage. The Vessel may carry contraband, explosives, munitions, warlike stores, hazardous cargo and may sail armed or unarmed and with or without convoy.

(c) In addition to all other liberties herein the Owner shall have the right to withhold delivery of, reship to, deposit or discharge the cargo at any place whatsoever, surrender or dispose of the cargo in accordance with any direction, condition or agreement imposed upon or exacted from the Owner by any government or department thereof or any person purporting to act with the authority of either of them. In any of the above circumstances the cargo shall be solely at their risk and expense and all expenses and charges so incurred shall be payable by the owner or consignee thereof and shall be a lien on the cargo.

30. Priority. All agreements of the Owner contained in this Charter Party shall be subject to any orders or instructions of priority or requisition issued by the United States Government or the Government of

the flag of the Vessel or any agencies thereof, or the requirement of naval or military authorities or other agencies of Government.

31. Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act, and a judgment of the Court shall be entered upon any award made by said arbitrator. Nothing in this clause shall be deemed to waive Owner's right to lien on the cargo for freight, dead freight or demurrage.

32. Approval. If U.S. Government approval is required, this Charter Party is subject to that approval.

Bill of Lading

Shipped in apparent good order and condition by _____ on board the _____ Motorship; Steamship _____

Whereof _____ is the Master at the port of _____ a quantity said to be _____ pounds/tons/barrels/gallons of _____, the quantity, measurement, weight, gauge, quality, nature, value and condition of the cargo are based on information given by the shipper and are unknown to the Vessel and the Master, to be delivered at the port of _____ or so near thereto as the Vessel can safely get, always afloat, unto _____ or order on payment of freight at the rate of _____.

This shipment is carried under and pursuant to the terms of the Charter dated _____ at _____ between _____ and _____ as Charterer, and all the terms whatsoever of the said Charter except the rate and payment of freight specified therein apply to and govern the rights of the parties concerned in this shipment.

If this Bill of Lading is a document of title to which the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, or similar legislation giving statutory effect to the International Convention for the Unification of Certain Rules relating to Bills of Lading at Brussels of August 25, 1924, applies by reason of the port of loading or discharge being in territory in which the said Act or other similar legislation is in force, this Bill of Lading shall have effect subject to the provisions of the said Act or other similar legislation, as the case may be, which shall be deemed incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act or other similar legislation. If any term of this Bill of Lading is repugnant to the said Act or other similar legislation as so incorporated, such terms shall be void to that extent but no further.

IN WITNESS WHEREOF, the Master has signed _____ Bills of Lading of this tenor and date, one of which being accomplished, the others will be void.

Dated at _____ this _____ day of _____

_____ Master

or _____ As Agents for the Master

By _____

[CAJA A729-A732]

Associate of Ship Brokers & Agents (U.S.A.), Inc. October 1977

CODE WORD FOR THIS CHARTER PARTY: ASBATANKVOY

TANKER VOYAGE CHARTER PARTY

PREAMBLE

_____ _____
Place Date

IT IS THIS DAY AGREED between _____ _____ chartered owner/owner (hereinafter called the "Owner") of the _____ SS/MS _____ (hereinafter called the "Vessel") and _____ _____ (hereinafter called the "Charterer") that the transportation herein provided for will be performed subject to the terms and conditions of this Charter Party, which includes this Preamble and Part I and Part II. In the event of a conflict, the provisions of Part I will prevail over those contained in Part II.

PART I

A. Description and Position of Vessel:

Deadweight: tons (2240 lbs.) Classed:

Loaded draft of Vessel on assigned summer freeboard ft. in. in salt water.

Capacity for cargo: tons (of 2240 lbs. each) % more or less, Vessel's option.

Coated: ☐ Yes ☐ No

Coiled: ☐ Yes ☐ No Last two cargoes:

Now: Expected Ready:

B. Laydays:

Commencing: Cancelling:

C. Loading Port(s):

Charterer's Option

D. Discharging Port(s):

Charterer's Option

E. Cargo:

Charterer's Option

F. Freight Rate:

per ton (of 2240 lbs. each)

G. Freight Payable to: at

H. Total Laytime in Running Hours:

I. Demurrage per day:

J. Commission of % is payable by Owner to

on the actual amount freight, when and as freight is paid.

K. The place of General Average and arbitration proceedings to be London/New York (strike out one).

L. Tovalop: Owner warrants vessel to be a member of TOVALOP scheme and will be so maintained throughout duration of this charter.

M. Special Provisions:

IN WITNESS WHEREOF, the parties have caused this Charter, consisting of a Preamble, Parts I and II, to be executed in duplicate as of the day and year first above written.

Witness the signature of: _____

By: _____

Witness the Signature of: _____

By: _____

PART II

1. WARRANTY—VOYAGE—CARGO. The vessel, classed as specified in Part I hereof, and to be so maintained during the currency of this Charter, shall, with all convenient dispatch, proceed as ordered to Loading Port(s) named in accordance with Clause 4 hereof, or so near thereunto as she may safely get (always afloat), and being seaworthy, and having all pipes, pumps and heater coils in good working order, and being in every respect fitted for the voyage, so far as the foregoing conditions can be attained by the exercise of due diligence, perils of the sea and any other cause of whatsoever kind beyond the Owner's and/or Masters control excepted, shall load (always afloat) from the factors of the Charterer a full and complete cargo of petroleum and/or its products in bulk, not exceeding what she can reasonably stow and carry over and above her bunker fuel, consumable stores, boiler feed, culinary and drinking water, and complement and their effects (sufficient space to be left in the tanks to provide for the expansion of the cargo), and being so loaded shall forthwith proceed, as ordered on signing Bills of Lading, direct to the Discharging Port(s), or so near thereunto as she may safely get (always afloat), and deliver said cargo. If heating of the cargo is requested by the Charterer, the Owner shall exercise due diligence to maintain the temperatures requested.

2. FREIGHT. Freight shall be at the rate stipulated in Part I and shall be computed on intake quantity (except deadfreight as per Clause 3) as shown on the Inspector's Certificate of Inspection. Payment of freight shall be made by Charterer without discount upon delivery of cargo at destination, less any disbursements or advances made to the Master or

Owner's agents at ports of loading and/or discharge and cost of insurance thereon. No deduction of freight shall be made for water and/or sediment contained in the cargo. The services of the Petroleum Inspector shall be arranged and paid for by the Charterer who shall furnish the Owner with a copy of the Inspector's Certificate.

3. DEADFREIGHT. Should the Charterer fail to supply a full cargo, the Vessel may, at the Master's option, and shall, upon request of the Charterer, proceed on her voyage, provided that the tanks in which cargo is loaded are sufficiently filled to put her in seaworthy condition. In that event, however, deadfreight shall be paid at the rate specified in Part I hereof on the difference between the intake quantity and the quantity the Vessel would have carried if loaded to her minimum permissible freeboard for the voyage.

4. NAMING LOADING AND DISCHARGE PORTS.

(a) The Charterer shall name the loading port or ports at least twenty-four (24) hours prior to the Vessel's readiness to sail from the last previous port of discharge, or from bunkering port for the voyage, or upon signing this Charter if the Vessel has already sailed. However, Charterer shall have the option of ordering the Vessel to the following destinations for wireless orders:

	On a voyage to a port or ports in:
ST. KITTS	Caribbean or U.S. Gulf loading port(s)
PORT SAID	Eastern Mediterranean or Persian Gulf loading port(s) (from ports west of Port Said.)

(b) If lawful and consistent with Part I and with the Bills of Lading, the Charterer shall have the option of nominating a discharging port or ports by radio to the Master on or before the Vessel's arrival at or off the following places:

Place	*On a voyage to a port or ports in:*
LAND'S END	United Kingdom/Continent (Bordeaux/Hamburg range) or Scandinavia (including Denmark)
SUEZ	Mediterranean (from Persian Gulf)
GIBRALTER	Mediterranean (from Western Hemisphere).

(c) Any extra expense incurred in connection with any change in loading or discharging ports (so named) shall be paid for by the Charterer and any time thereby lost to the Vessel shall count as used laytime.

5. LAYDAYS. Laytime shall not commence before the date stipulated in Part I, except with the Charterer's sanction. Should the Vessel not be ready to load by 4:00 o'clock P.M. (local time) on the cancelling date stipulated in Part I, the Charterer shall have the option of cancelling this Charter by giving Owner notice of such cancellation within twenty-four (24) hours after such cancellation date; otherwise this Charter to remain in full force and effect.

6. NOTICE OF READINESS. Upon arrival at customary anchorage at each port of loading or discharge, the Master or his agent shall give the Charterer or his agent notice by letter, telegraph, wireless or telephone that the Vessel is ready to load or discharge cargo, berth or no berth, and laytime, as hereinafter provided, shall commence upon the expiration of six (6) hours after receipt of such notice, or upon the

Vessel's arrival in berth (i.e., finished mooring when at a sealoading or discharging terminal and all fast when loading or discharging alongside a wharf), whichever first occurs. However, where delay is caused to Vessel getting into berth after giving notice of readiness for any reason over which Charterer has no control, such delay shall not count as used laytime.

7. HOURS FOR LOADING AND DISCHARGING. The number of running hours specified as laytime in Part I shall be permitted the Charterer as laytime for loading and discharging cargo; but any delay due to the Vessel's condition or breakdown or inability of the Vessel's facilities to load or discharge cargo within the time allowed shall not count as used laytime. If regulations of the Owner or port authorities prohibit loading or discharging of the cargo at night, time so lost shall not count as used laytime; if the Charterer, shipper or consignee prohibits loading or discharging at night, time so lost shall count as used laytime. Time consumed by the vessel in moving from loading or discharge port anchorage to her loading or discharge berth, discharging ballast water or slops, will not count as used laytime.

8. DEMURRAGE. Charterer shall pay demurrage per running hour and pro rata for a part thereof at the rate specified in Part I for all time that loading and discharging and used laytime as elsewhere herein provided exceeds the allowed laytime elsewhere herein specified. If, however, demurrage shall be incurred at ports of loading and/or discharge by reason of fire, explosion, storm or by a strike, lockout, stoppage or restraint of labor or by breakdown of machinery or equipment in or about the plant of the Charterer, supplier, shipper or consignee of the cargo, the rate of demurrage shall be reduced one-half of the amount stated in

Part I per running hour or pro rata for part of an hour for demurrage so incurred. The Charterer shall not be liable for any demurrage for delay caused by strike, lockout, stoppage or restraint of labor for Master, officers and crew of the Vessel or tugboat or pilots.

9. SAFE BERTHING—SHIFTING. The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer. The Charterer shall have the right of shifting the Vessel at ports of loading and/or discharge from one safe berth to another on payment of all towage and pilotage shifting to next berth, charges for running lines on arrival at and leaving that berth, additional agency charges and expense, customs overtime and fees, and any other extra port charges or port expenses incurred by reason of using more than one berth. Time consumed on account of shifting shall count as used laytime except as otherwise provided in Clause 15.

10. PUMPING IN AND OUT. The cargo shall be pumped into the Vessel at the expense, risk and peril of the Charterer, and shall be pumped out of the Vessel at the expense of the Vessel, but at the risk and peril of the Vessel only so far as the Vessel's permanent hose connections, where delivery of the cargo shall be taken by the Charterer or its consignee. If required by Charterer, Vessel after discharging is to clear shore pipe lines of cargo by pumping water through them and time consumed for this purpose shall apply against allowed laytime. The Vessel shall supply her pumps and the necessary power for discharging in all ports, as well as necessary hands. However, should the Vessel be pre-

vented from supplying such power by reason of regulations prohibiting fires on board, the Charterer or consignee shall supply, at its expense, all power necessary for discharging as well as loading, but the Owner shall pay for power supplied to the Vessel for other purposes. If cargo is loaded from lighters, the Vessel shall furnish steam at Charterer's expense for pumping cargo into its Vessel, if requested by the Charterer, providing the Vessel has facilities for generating steam and is permitted to have fires on board. All overtime of officers and crew incurred in loading and/or discharging shall be for account of the Vessel.

11. HOSES: MOORING AT SEA TERMINALS. Hoses for loading and discharging shall be furnished by the Charterer and shall be connected and disconnected by the Charterer, or, at the option of the Owner, by the Owner at the Charterer's risk and expense. Laytime shall continue until the hoses have been disconnected. When Vessel loads or discharges at a sea terminal, the Vessel shall be properly equipped at Owner's expense for loading or discharging at such place, including suitable ground tackle, mooring lines and equipment for handling submarine hoses.

12. DUES—TAXES —WHARFAGE. The Charterer shall pay all taxes, dues and other charges on the cargo, including but not limited to Customs overtime on the cargo, Venezuelan Habilitation Tax, C.I.M. Taxes at Le Havre and Portuguese Imposto de Comercio Maritime. The Charterer shall also pay all taxes on freight at loading or discharging ports and any unusual taxes, assessments and governmental charges which are not presently in effect but which may be imposed in the future on the Vessel or freight. The Owner shall pay all dues and other charges on the Vessel (whether or not such dues or charges are assessed on the basis of

quantity of cargo), including but not limited to French droits de quai and Spanish derramas taxes. The Vessel shall be free of charges for the use of any wharf, dock, place or mooring facility arranged by the Charterer for the purpose of loading or discharging cargo; however, the Owner shall be responsible for charges for such berth when used solely for Vessel's purposes, such as awaiting Owner's orders, tank cleaning, repairs, etc. before, during or after loading or discharging.

13. (a) CARGOES EXCLUDED VAPOR PRESSURE. Cargo shall not be shipped which has a vapor pressure at one hundred degrees Fahrenheit (100°F.) in excess of thirteen and one-half pounds (13.5 lbs.) as determined by the current A.S.T.M. Method (Reid) D-323.

(b) FLASH POINT. Cargo having a flash point under one hundred and fifteen degrees Fahrenheit (115°F.) (closed cup) A.S.T.M. Method D-56 shall not be loaded from lighters but this clause shall not restrict the Charterer from loading or topping off Crude Oil from vessels or barges inside or outside the bar at any port or place where bar conditions exist.

14. (a) ICE. In case port of loading or discharge should be inaccessible owing to ice, the Vessel shall direct her course according to Master's judgment, notifying by telegraph or radio, if available, the Charterers, shipper or consignee, who is bound to telegraph or radio orders for another port, which is free from ice and where there are facilities for the loading or reception of the cargo in bulk. The whole of the time occupied from the time the Vessel is diverted by reason of the ice until her arrival at an ice-free port of loading or discharge, as the case may be, shall be paid for by the Charterer at the demurrage rate stipulated in Part I.

(b) If on account of ice the Master considers it dangerous to enter or remain at any loading or discharging place for fear of the Vessel being frozen in or damaged, the Master shall communicate by telegraph or radio, if available, with the Charterer, shipper or consignee of the cargo, who shall telegraph or radio him in reply, giving orders to proceed to another port as per Clause 14 (a) where there is no danger of ice and where there are the necessary facilities for the loading or reception of the cargo in bulk, or to remain at the original port at their risk, and in either case Charterer to pay for the time that the Vessel may be delayed, at the demurrage rate stipulated in Part I.

15. TWO OR MORE PORTS COUNTING AS ONE. To the extent that the freight rate standard of reference specified in Part I F hereof provides for special groupings or combinations of ports or terminals, any two or more ports or terminals within each such grouping or combination shall count as one port for purposes of calculating freight and demurrage only, subject to the following conditions:

(a) Charterer shall pay freight at the highest rate payable under Part I F hereof for a voyage between the loading and discharge ports used by Charterer.

(b) All charges normally incurred by reason of using more than one berth shall be for Charterer's account as provided in Clause 9 hereof.

(c) Time consumed shifting between the ports or terminals within the particular grouping or combination shall not count as used laytime.

(d) Time consumed shifting between berths within one of the ports or terminals of the particular grouping or combination shall count as used laytime.

16. GENERAL CARGO. The Charterer shall not be permitted to ship any packaged goods or non-liquid bulk cargo of any description; the cargo the Vessel is to load under this Charter is to consist only of liquid bulk cargo as specified in Clause I.

17. (a). QUARANTINE. Should the Charterer send the Vessel to any port or place where a quarantine exists, any delay thereby caused to the Vessel shall count as used laytime; but should the quarantine not be declared until the Vessel is on passage to such port, the Charterer shall not be liable for any resulting delay.

(b) FUMIGATION. If the Vessel, prior to or after entering upon this Charter, has docked or docks at any wharf which is not rat-free or stegomyia-free, she shall, before proceeding to a rat-free or stegomyia-free wharf, be fumigated by the Owner at his expense, except that if the Charterer ordered the Vessel to an infected wharf the Charterer shall bear the expense of fumigation.

18. CLEANING. The Owner shall clean the tanks, pipes and pumps of the Vessel to the satisfaction of the Charterer's Inspector. The Vessel shall not be responsible for any admixture if more than one quality of oil is shipped, nor for leakage, contamination or deterioration in quality of the cargo unless the admixture, leakage, contamination or deterioration results from (a) unseaworthiness existing at the time of loading or at the inception of the voyage which was discoverable by the exercise of due diligence, or (b) error or fault of the servants of the Owner in the loading, care or discharge of the cargo.

19. GENERAL EXCEPTIONS CLAUSE. The Vessel, her Master and Owner shall not, unless otherwise in this Charter expressly provided, be responsible

for any loss or damage, or delay or failure in performing hereunder, arising or resulting from:—any act, neglect, default or barratry of the Master, pilots, mariners or other servants of the Owner in the navigation or management of the Vessel; fire, unless caused by the personal design or neglect of the Owner; collision, stranding or peril, danger or accident of the sea or other navigable waters; saving or attempting to save life or property; wastage in weight or bulk, or any other loss or damage arising from inherent defect, quality or vice of the cargo; any act or omission of the Charterer or Owner, shipper or consignee of the cargo, their agents or representatives; insufficiency of packing; insufficiency or inadequacy or marks; explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, equipment or machinery; unseaworthiness of the Vessel unless caused by want of due diligence on the part of the Owner to make the Vessel seaworthy or to have her properly manned, equipped and supplied; or from any other cause of whatsoever kind arising without the actual fault of privity of the Owner. And neither the Vessel nor Master or Owner, nor the Charterer, shall, unless otherwise in this Charter expressly provided, be responsible for any loss of damage or delay or failure in performing hereunder, arising or resulting from:—Act of God; act of war; perils of the seas; act of public enemies, pirates or assailing thieves; arrest or restraint of princes, rulers or people; or seizure under legal process provided bond is promptly furnished to release the Vessel or cargo; strike or lockout or stoppage or restraint of labor from whatever cause, either partial or general; or riot or civil commotion.

20. ISSUANCE AND TERMS OF BILLS OF LADING.

(a) The Master shall, upon request, sign Bills of Lading in the form appearing below for all cargo shipped but without prejudice to the rights of the Owner and Charterer under the terms of this Charter. The Master shall not be required to sign Bills of Lading for any port which, the Vessel cannot enter, remain at and leave in safety and always afloat nor for any blockaded port.

(b) The carriage of cargo under this Charter Party and under all Bills of Lading issued for the cargo shall be subject to the statutory provisions and other terms set forth or specified in sub-paragraphs (i) through (vii) of this clause and such terms shall be incorporated verbatim or be deemed incorporated by the reference in any such Bill of Lading. In such sub-paragraphs and in any Act referred to therein, the word "carrier" shall include the Owner and the Chartered Owner of the Vessel.

(i) CLAUSE PARAMOUNT. This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Acts of the United States, approved April 16, 1936, except that if this Bill of Lading is issued at a place where any other Act, ordinance or legislation gives statutory effect to the International Convention for the Unification of Certain Rules relating to Bills of Lading at Brussels, August 1924, then this Bill of Lading shall have effect, subject to the provisions of such Act, ordinance or legislation. The applicable Act, ordinance or legislation (hereinafter called the "Act") shall be deemed to be incorporated herein and nothing herein contained shall be deemed a surrender by the Owner of any of its rights or immunities or

an increase of any of its responsibilities or liabilities under the Act. If any term of this Bill of Lading be repugnant to the Act to any extent, such term shall be void to the extent but no further.

(ii) JASON CLAUSE. In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Owner is not responsible, by statute, contract or otherwise, the cargo shippers, consignees or owners of the cargo shall contribute with the Owner in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the cargo. If a salving ship is owned or operated by the Owner, salvage shall be paid for as fully as if the said salving ship or ships belonged to strangers. Such deposit as the Owner or his agents may deem sufficient to cover the estimated contribution of the cargo and any salvage and special charges theron shall, if required, be made by the cargo, shippers, consignees or owners of the cargo to the carrier before delivery.

(iii) GENERAL AVERAGE. General Average shall be adjusted, stated and settled according to York/Antwerp Rules 1950 and, as to matters not provided for by those rules, according to the laws and usages at the port of New York or at the port of London, whichever place is specified in Part I of this Charter. If a General Average statement is required, it shall be prepared at such port or place in the United States or United Kingdom, whichever country is specified in Part I of this Charter, as may be selected by the Owner, unless otherwise mutually agreed, by an Adjuster appointed by the Owner and approved by the

Charterer. Such Adjuster shall attend to the settlement and the collection of the General Average, subject to customary charges. General Average Agreements and/or security shall be furnished by Owner and/or Charterer, and/or Owner and/or Consignee of cargo, if requested. Any cash deposit being made as security to pay General Average and/or salvage shall be remitted to the Average Adjuster and shall be held by him at his risk in a special account in a duly authorized and licensed bank at the place where the General Average statement is prepared.

(iv) BOTH TO BLAME. If the Vessel comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, maringer, pilot or the servants of the Owner in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder shall indemnify the Owner against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said cargo, paid or payable by the other or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Owner. The foregoing provisions shall also apply where the owners, operators or those in charge of any ships or objects other than, or in addition to, the colliding ships or object are at fault in respect of a collision or contact.

(v) LIMITATION OF LIABILITY. Any provision of this Charter to the contrary notwithstanding, the Owner shall have the benefit of all limitations of, and exemptions from, liability accorded to the owner or chartered owner of vessels by any statute or rule of law for the time being in force.

(vi) WAR RISKS. (a) If any port of loading or of discharge named in this Charter Party or to which the Vessel may properly be ordered pursuant to the terms of the Bills of Lading be blockaded, or

(b) If owing to any war, hostilities, warlike operations, civil war, civil commotions, revolutions or the operation of international law (a) entry to any such port of loading or of discharge or the loading or discharge of cargo at any such port be considered by the Master or Owners in his or their discretion dangerous or prohibited or (b) it be considered by the Master or Owners in his or their discretion dangerous or impossible for the Vessel to reach any such port of loading or discharge— the Charterers shall have the right to order the cargo or such part of it as may be affected to be loaded or discharged at any other safe port of loading or of discharge within the range of loading or discharging ports respectively established under the provisions of the Charter Party (provided such other port is not blockaded or that entry thereto or loading or discharge of cargo thereat is not in the Master's or Owner's discretion dangerous or prohibited). If in respect of a port of discharge no orders be received from the Charterers within 48 hours after they or their agents have received from the Owners a request for the nomination of a substitute port, the Owners shall then be at liberty to discharge the cargo at any safe port which they or the Master may in their or his discretion decide on (whether within the range of discharging ports established under the provisions of the Charter Party or not) and such discharge shall be deemed to be due fulfillment of the contract or contracts of affreightment so far as cargo so discharged is concerned. In the event of the cargo being loaded or discharged at any such other port within the respective range of loading or discharg-

ing ports established under the provisions of the Charter Party, the Charter Party shall be read in respect of freight and all other conditions whatsoever as if the voyage performed were that originally designated. In the event, however, that the Vessel discharges the cargo at a port outside the range of discharging ports established under the provisions of the Charter Party, freight shall be paid as for the voyage originally designated and all extra expenses involved in reaching the actual port of discharge and or discharging the cargo thereat shall be paid by the Charterers or Cargo Owners. In the latter event the Owners shall have a lien on the cargo for all such extra expenses.

(c) The Vessel shall have liberty to comply with any directions or recommendations as to departure, arrival, routes, ports of call, stoppages, destinations, zones, waters, delivery or in any otherwise whatsoever given by the government of the nations under whose flag the Vessel sails or any other government or local authority including any de facto government or local authority or by any person or body acting or purporting to act as or with the authority of any such government or authority or by any committee or person having under the terms of the war risks insurance on the vessel the right to give any such directions or recommendations. If by reason of or in compliance with any such directions or recommendations, anything is done or is not done such shall not be deemed a deviation.

If by reason of or in compliance with any such direction or recommendation the Vessel does not proceed to the port or ports of discharge originally designated or to which she may have been ordered pursuant to the terms of the Bills of Lading, the Vessel may proceed to any safe port of discharge which the Master or Owners in his or their discretion may decide on and there dis-

charge the cargo. Such discharge shall be deemed to be due fulfillment of the contract or contracts of affreightment and the Owners shall be entitled to freight as if discharge has been effected at the port or ports originally designated or to which the vessel may have been ordered pursuant to the terms of the Bills of Lading. All extra expenses involved in reaching and discharging the cargo at any such other port of discharge shall be paid by the Charterers and/or Cargo Owners and the Owners shall have a lien on the cargo for freight and all such expenses.

(vii) DEVIATION CLAUSE. The Vessel shall have liberty to call at any ports in any order, to sail with or without pilots, to tow or to be towed, to go to the assistance of vessels in distress, to deviate for the purpose of saving life or property or of landing any ill or injured person on board, and to call for fuel at any port or ports in or out of the regular course of the voyage. Any salvage shall be for the sole benefit of the Owner.

21. LIEN. The Owner shall have an absolute lien on the cargo for all freight, deadfreight, demurrage and costs, including attorney fees, of recovering the same, which lien shall continue after delivery of the cargo into the possession of the Charterer, or of the holders of any Bills of Lading covering the same or of any storageman.

22. AGENTS. The Owner shall appoint Vessel's agents at all ports.

23. BREACH. Damages for breach of this Charter shall include all provable damages, and all costs of suit and attorney fees incurred in any action hereunder.

24. ARBITRATION. Any and all differences and disputes of whatsoever nature arising out of this Char-

ter shall be put to arbitration in the City of New York or in the City of London whichever place is specified in Part I of this charter pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen. The decision of any two of the three on any point or points shall be final. Either party hereto may call for such arbitration by service upon any officer of the other, wherever he may be found, of a written notice specifying the name and address of the arbitrator chosen by the first moving party and a brief description of the disputes or differences which such party desires to put to arbitration. If the other party shall not, by notice served upon an officer of the first moving party within twenty days of the service of such first notice, appoint its arbitrator to arbitrate the dispute or differences specified, then the first moving party shall have the right without further notice to appoint a second arbitrator, who shall be a disinterested person with precisely the same force and effect as if said second arbitrator has been appointed by the other party. In the event that the two arbitrators fail to appoint a third arbitrator within twenty days of the appointment of the second arbitrator, either arbitrator may apply to a Judge of any court of maritime jurisdiction in the city above-mentioned for the appointment of a third arbitrator, and the appointment of such arbitrator by such Judge on such application shall have precisely the same force and effect as if such arbitrator had been appointed by the two arbitrators. Until such time as the arbitrators finally close the hearings either party shall have the right by written notice served on the arbitrators and on an officer of the other party to specify further disputes or differences under this Charter for hearing

and determination. Awards made in pursuance to this clause may include costs, including a reasonable allowance for attorney's fees, and judgement may be entered upon any award made hereunder in any Court having jurisdiction in the premises.

25. SUBLET. Charterer shall have the right to sublet the Vessel. However, Charterer shall always remain responsible for the fulfillment of this Charter in all its terms and conditions.

26. OIL POLLUTION CLAUSE. Owner agrees to participate in Charterer's program covering oil pollution avoidance. Such program prohibits discharge overboard of all oily water, oily ballast or oil in any form of a persistent nature, except under extreme circumstances whereby the safety of the vessel, cargo or life at sea would be imperiled.

Upon notice being given to the Owner that Oil Pollution Avoidance controls are required, the Owner will instruct the Master to retain on board the vessel all oily residues from consolidated tank washings, dirty ballast, etc., in one compartment, after separation of all possible water has taken place. All water separated to be discharged overboard.

If the Charterer requires that demulsifiers shall be used for the separation of oil/water, such demulsifiers shall be obtained by the Owner and paid for by Charterer.

The oil residues will be pumped ashore at the loading or discharging terminal, either as segregated oil, dirty ballast or co-mingled with cargo as it is possible for Charterers to arrange. If it is necessary to retain the residue on board co-mingled with or segregated

from the cargo to be loaded, Charterers shall pay for any deadfreight so incurred.

Should it be determined that the residue is to be comingled or segregated on board, the Master shall arrange that the quantity of tank washings be measured in conjunction with cargo suppliers and a note of the quantity measured made in the vessel's ullage record.

The Charterer agrees to pay freight as per the terms of the Charter Party on any consolidated tank washings, dirty ballast, etc., retained on board under Charterer's instructions during the loaded portion of the voyage up to a maximum of 1% of the total deadweight of the vessel that could be legally carried for such voyage. Any extra expenses incurred by the vessel at loading or discharging port in pumping ashore oil residues shall be for Charterer's account, and extra time, if any, consumed for this operation shall count as used laytime.

BILL OF LADING

Shipped in apparent good order and condition by _____

_____

on board the _____

Steamship Motorship _____

whereof _____

is Master, at the port of _____

_____

_____

_____

_____

_____

_____

to be delivered at the port of _____

or so near thereto as the Vessel can safely get, always afloat, unto _____

or order on payment of freight at the rate of _____

_____

This shipment is carried under and pursuant to the terms of the contract charter dated New York/London

_____

between _____

and _____,

as Charterer, and all the terms whatsoever of the said contract charter except the rate and payment of freight specified therein apply to and govern the rights of the parties concerned in this shipment.

In witness whereof the Master has signed _____

_____

Bills of Lading of this tenor and date, one of which being accomplished, the others will be void.

Dated at _____ this _____ day of _____.

_____

Master

* * *

[CAJA A683-A687]

[logo] American Arbitration Association

Supplementary Rules for Class Arbitrations

Effective Date October 8, 2003

1. Applicability

(a) These Supplementary Rules for Class Arbitrations ("Supplementary Rules") shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association ("AAA") where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules. These Supplementary Rules shall also apply whenever a court refers a matter pleaded as a class action to the AAA for administration, or when a party to a pending AAA arbitration asserts new claims on behalf of or against a class or purported class.

(b) Where inconsistencies exist between these Supplementary Rules and other AAA rules that apply to the dispute, these Supplementary Rules will govern. The arbitrator shall have the authority to resolve any inconsistency between any agreement of the parties and these Supplementary Rules, and in doing so shall endeavor to avoid any prejudice to the interests of absent members of a class or purported class.

(c) Whenever a court has, by order, addressed and resolved any matter that would otherwise be decided by an arbitrator under these Supplementary Rules, the arbitrator shall follow the order of the court

2. Class Arbitration Roster and Number of Arbitrators

(a) In any arbitration conducted pursuant to these Supplementary Rules, at least one of the arbitrators shall be appointed from the AAA's national roster of class arbitration arbitrators.

(b) If the parties cannot agree upon the number of arbitrators to be appointed, the dispute shall be heard by a sole arbitrator unless the AAA, in its discretion, directs that three arbitrators be appointed. As used in these Supplementary Rules, the term "arbitrator" includes both one and three arbitrators.

3. Construction of the Arbitration Clause

Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award"). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them,

until the arbitrator is informed of the ruling of the court.

In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.

4. Class Certification

(a) Prerequisites to a Class Arbitration

If the arbitrator is satisfied that the arbitration clause permits the arbitration to proceed as a class arbitration, as provided in Rule 3, or where a court has ordered that an arbitrator determine whether a class arbitration may be maintained, the arbitrator shall determine whether the arbitration should proceed as a class arbitration. For that purpose, the arbitrator shall consider the criteria enumerated in this Rule 4 and any law or agreement of the parties the arbitrator determines applies to the arbitration. In doing so, the arbitrator shall determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described. The arbitrator shall permit a representative to do so only if each of the following conditions is met:

(1) the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately protect the interests of the class;

(5) counsel selected to represent the class will fairly and adequately protect the interests of the class; and

(6) each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.

(b) Class Arbitrations Maintainable

An arbitration may be maintained as a class arbitration if the prerequisites of subdivision (a) are satisfied, and in addition, the arbitrator finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(1) the interest of members of the class in individually controlling the prosecution or defense of separate arbitrations;

(2) the extent and nature of any other proceedings concerning the controversy already commenced by or against members of the class;

(3) the desirability or undesirability of concentrating the determination of the claims in a single arbitral forum; and

(4) the difficulties likely to be encountered in the management of a class arbitration.

5. Class Determination Award

(a) The arbitrator's determination concerning whether an arbitration should proceed as a class arbitration shall be set forth in a reasoned, partial final award (the "Class Determination Award"), which shall address each of the matters set forth in Rule 4.

(b) A Class Determination Award certifying a class arbitration shall define the class, identify the class representative(s) and counsel, and shall set forth the class claims, issues, or defenses. A copy of the proposed Notice of Class Determination (see Rule 6), specifying the intended mode of delivery of the Notice to the class members, shall be attached to the award.

(c) The Class Determination Award shall state when and how members of the class may be excluded from the class arbitration. If an arbitrator concludes that some exceptional circumstance, such as the need to resolve claims seeking injunctive relief or claims to a limited fund, makes it inappropriate to allow class members to request exclusion, the Class Determination Award shall explain the reasons for that conclusion.

(d) The arbitrator shall stay all proceedings following the issuance of the Class Determination Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Class Determination Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Class Determination Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with

the arbitration on the basis stated in the Class Determination Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court

(e) A Class Determination Award may be altered or amended by the arbitrator before a final award is rendered.

6. Notice of Class Determination

(a) In any arbitration administered under these Supplementary Rules, the arbitrator shall, after expiration of the stay following the Class Determination Award, direct that class members be provided the best notice practicable under the circumstances (the "Notice of Class Determination"). The Notice of Class Determination shall be given to all members who can be identified through reasonable effort.

(b) The Notice of Class Determination must concisely and clearly state in plain, easily understood language:

(1) the nature of the action;

(2) the definition of the class certified;

(3) the class claims, issues, or defenses;

(4) that a class member may enter an appearance through counsel if the member so desires, and that any class member may attend the hearings;

(5) that the arbitrator will exclude from the class any member who requests exclusion, stating

when and how members may elect to be excluded;

(6) the binding effect of a class judgment on class members;

(7) the identity and biographical information about the arbitrator, the class representative(s) and class counsel that have been approved by the arbitrator to represent the class; and

(8) how and to whom a class member may communicate about the class arbitration, including information about the AAA Class Arbitration Docket (see Rule 9).

7. Final Award

The final award on the merits in a class arbitration, whether or not favorable to the class, shall be reasoned and shall define the class with specificity. The final award shall also specify or describe those to whom the notice provided in Rule 6 was directed, those the arbitrator finds to be members of the class, and those who have elected to opt out of the class.

8. Settlement, Voluntary Dismissal, or Compromise

(a) (1) Any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of an arbitration filed as a class arbitration shall not be effective unless approved by the arbitrator.

(2) The arbitrator must direct that notice be provided in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(3) The arbitrator may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding

that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(b) The parties seeking approval of a settlement, voluntary dismissal, or compromise under this Rule must submit to the arbitrator any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(c) The arbitrator may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(d) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires approval under this Rule. Such an objection may be withdrawn only with the approval of the arbitrator.

9. **Confidentiality; Class Arbitration Docket**

(a) The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations. All class arbitration hearings and filings may be made public, subject to the authority of the arbitrator to provide otherwise in special circumstances. However, in no event shall class members, or their individual counsel, if any, be excluded from the arbitration hearings.

(b) The AAA shall maintain on its Web site a Class Arbitration Docket of arbitrations filed as class arbitrations. The Class Arbitration Docket will provide certain information about the arbitration to the extent known to the AAA, including:

(1) a copy of the demand for arbitration;

(2) the identities of the parties;

(3) the names and contact information of counsel for each party;

(4) a list of awards made in the arbitration by the arbitrator; and

(5) the date, time and place of any scheduled hearings.

10. Form and Publication of Awards

(a) Any award rendered under these Supplementary Rules shall be in writing, shall be signed by the arbitrator or a majority of the arbitrators, and shall provide reasons for the award.

(b) All awards rendered under these Supplementary Rules shall be publicly available, on a cost basis.

11. Administrative Fees and Suspension for Nonpayment

(a) A preliminary filing fee of $3,250 is payable in full by a party making a demand for treatment of a claim, counterclaim, or additional claim as a class arbitration. The preliminary filing fee shall cover all AAA administrative fees through the rendering of the Clause Construction Award. If the arbitrator determines that the arbitration shall proceed beyond the Clause Construction Award, a supplemental filing fee shall be paid by the requesting party. The supplemental filing fee shall be calculated based on the amount claimed in the class arbitration and in accordance with the fee schedule contained in the AAA's Commercial Arbitration Rules.

(b) Disputes regarding the parties' obligation to pay administrative fees or arbitrator's compensation pursuant to applicable law or the parties' agree-

ment may be determined by the arbitrator. Upon the joint application of the parties, however, an arbitrator other than the arbitrator appointed to decide the merits of the arbitration, shall be appointed by the AAA to render a partial final award solely related to any disputes regarding the parties' obligations to pay administrative fees or arbitrator's compensation.

(c) If an invoice for arbitrator compensation or administrative charges has not been paid in full, the AAA may so inform the parties in order that one of them may advance the required deposit. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

(d) If an arbitration conducted pursuant to these Supplementary Rules is suspended for nonpayment, a notice that the case has been suspended shall be published on the AAA's Class Arbitration Docket.

12. Applications to Court and Exclusion of Liability

(a) No judicial proceeding initiated by a party relating to a class arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a class arbitration or potential class arbitration under these Supplementary Rules is a necessary or proper party in or to judicial proceedings relating to the arbitration. It is the policy of the AAA to comply with any order of a court directed to the parties to an arbitration or with respect to the conduct of an arbitration, whether or not the AAA is named as a

party to the judicial proceeding in which the order is issued.

(c) Parties to a class arbitration under these Supplementary Rules shall be deemed to have consented that judgment upon each of the awards rendered in the arbitration may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these Supplementary Rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action seeking damages or injunctive relief for any act or omission in connection with any arbitration under these Supplementary Rules.

[CAJA A30-A43]

CONSOLIDATED DEMAND FOR CLASS ARBITRATION

* * *

I. NATURE OF DISPUTE

1. Animalfeeds International Corp. ("Animalfeeds"), JLM Europe B.V., JLM International, Inc. (collectively, "JLM"),[1] KP Chemical Co. ("KP Chemical"), and Nizhnekamskneftekhim USA, Inc. ("Nizh") (collectively, "Claimants"), each a party to an arbitration agreement covering business transactions[2] with at least

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[1] After the Parties executed the Agreement Regarding New York Arbitration Procedures For Putative Class Action Plaintiffs In Parcel Tanker Services Antitrust Matter ("Class Arbitration Agreement") (referenced below), they agreed to include JLM Europe B.V. and JLM International, Inc. as Parties to the Class Arbitration Agreement.

[2] More specifically, during the relevant time period (defined below), each Claimant entered into transactions with the Respondents that were governed by a standard form agreement. Claimants JLM, Nizh and KP Chemical entered into numerous spot market agreements with the Respondents pursuant to the ASBATANKVOY charter party form (a copy of which is attached as Exhibit A) published by the Association of Ship Brokers & Agents (U.S.A.), Inc. Claimant Animalfeeds entered into spot market agreements with the Respondents that were governed by the Vegoilvoy charter party, another standard form used in the parcel tanker industry. Samples of the various spot contracts entered into by Animalfeeds, JLM, Nizh, and KP Chemical are attached as Exhibits A1-A4. Claimant KP Chemical also entered into a contract of affreightment with Respondent Stolt (a copy of which is attached as Exhibit A5) during the relevant time period that incorporated the ASBATANKVOY form agreement.

one of the Respondents between August 1, 1998 and November 30, 2002, hereby demand that the Respondents submit to final and binding arbitration of the dispute described below and in the complaints filed in the actions entitled *Animalfeeds International Corp., et al. v. Stolt-Nielsen SA, et al.*, Civil Action No. 03-5002 (E.D. Pa. filed Sep. 4, 2003), *JLM Industries, Inc., et al. v. Stolt-Nielsen SA, et al.*, Civ. 303CV348 (D. Conn. filed Mar. 18, 2003), *KP Chemical Corp. v. Jo Tankers AS, et al.*, Civil Action No. 304CV249 (D. Conn. filed Feb. 11, 2004), and *Nizhnekamskneftekhim USA, Inc. v. Stolt-Nielsen S.A., et al.*, No. 03-cv-1202 (S.D. Tex. filed Apr. 8, 2003) ("Complaints"), copies of which are attached as Exhibits B-E, respectively.

2. Pursuant to their rights under the Class Arbitration Agreement (attached as Exhibit F), the Claimants assert claims on behalf of themselves and on behalf of the following class:

> All direct purchasers of parcel tanker transportation services globally for bulk liquid chemicals, edible oils, acids, and other specialty liquids from the Respondents and their co-conspirators (the "Class"), at any time during the period from August 1, 1998 to November 30, 2002 (the "Class Period").[3] Excluded from the Class are the Respondents, any subsidiaries or affiliates of the Respondents, and any of the Respondents' co-conspirators, whether or not named as a Respondent in this Arbitration Proceeding.

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[3] The Claimants may expand this period based on evidence produced in discovery.

The Claimants seek a consolidated arbitration of all of their relevant claims in one forum.[4]

3. This dispute arises out of the Respondents' global conspiracy to restrain the world market for parcel tanker shipping services, which caused the Claimants and the proposed Class to pay supracompetitive prices for transportation of bulk liquid chemicals, edible oils, acids, and other specialty liquids using parcel tankers and other related means. The Respondents conspired with each other to allocate customers and divide the world market for, and to raise the prices of, parcel tanker shipping services, a *per se* violation of United States antitrust law.

4. This dispute follows Stolt-Nielsen Transportation Group Ltd.'s ("Stolt's") conditional acceptance into the Amnesty Program of the United States Department of Justice's Antitrust Division ("DOJ"), which resulted from a full admission of wrongdoing for participating in the conspiracy at issue here. It also follows guilty pleas from Odfjell Seachem AS ("Odfjell"), Jo Tankers BV ("Jo"), and several of their executives to tampering artificially with the global market for parcel tanker shipping services, including the collusive fixing of prices for such services.

5. During the Class Period, the Respondents and their affiliates illegally conspired to allocate customers,

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[4] *See* Class Arbitration Agreement at ¶ 3 ("Nothing in this Agreement shall affect any rights the Class Plaintiffs may have to include in their consolidated arbitration demand claims arising out of any Charter Party Agreements that do not provide for arbitration in New York City, or any rights the Class Plaintiffs may have to assert that such claims should be arbitrated in New York City as part of the proceedings contemplated therein.").

divide markets, and raise prices. *See* Findings of Fact, *Stolt-Nielsen S.A. v. United States* (E.D. Pa. Jan. 14, 2005) ("Findings of Fact") (attached as Exh. G) at ¶ 15. Indeed, Stolt has admitted "that for several years [it] had express agreements with its competitors to divide customers using allocation lists negotiated and agreed upon by the companies." Findings of Fact ¶ 50; *see* Tr., *Stolt-Nielsen S.A. v. United States* (E.D. Pa. Apr. 13, 2004) ("Apr. 13, 2004 Tr."), at 164-66 (attached as Exh. H). The Respondents' conspiracy similarly and negatively affected the Claimants and the proposed Class as a whole by raising prices for parcel tanker shipping services.

6. The price-fixing conspiracy among the Respondents was sophisticated. By August 1998, Stolt and Odfjell had begun to memorialize their illegal customer allocation agreements in lists and spreadsheets, some of which are attached as Exhibits I-K. Stolt itself has characterized these lists as "a smoking gun of evidence of antitrust violations." Apr. 13, 2004 Tr. at 15:10-14 (attached as Exh. L).

7. Stolt and Odfjell met on numerous occasions during the Class Period in furtherance of the conspiracy. During some of these meetings, the companies' executives not only discussed "dividing the pie," -- *i.e.*, allocating customers and markets -- but also the monetary benefits of not competing with one another. For example, in March 2001, executives from Stolt and Odfjell met in League City, Texas to review the status of various contracts that they had with customers across the world. The next month, Stolt prepared spreadsheets to calculate the benefits of cooperating with Odfjell versus competing with it, one of which is contained in a memorandum from April 2001. *See* Apr. 10, 2001 Mem. from Bjorn Jansen to Richard Wingfield (attached as Exh.

M). In that memorandum, Stolt concluded that its agreement with Odfjell would lead to higher prices for all customers. *See id.* Indeed, if Stolt and Odfjell had decided to cancel their agreement and compete, "that most likely means we will suffer a reduction in rates in general." *Id.* at 2 (emphasis in original).[5]

8. The conspiracy extended beyond Stolt and Odfjell. On information and belief, Stolt executives colluded with Tokyo Marine Co. Ltd. ("Tokyo Marine") executives on shipping rates during the Class Period. Tokyo Marine, on information and belief, agreed that cooperation among all relevant players was the "only way to move the market." Similarly, Stolt also has admitted to having had discussions with Jo about allocating customer contracts throughout the Class Period. *See* Apr. 13, 2004 Tr. at 166:2-9 (attached as Exh. N).[6]

9. In addition to such cooperation, the Respondents affirmatively concealed the conspiracy's existence. A Stolt executive's journal entries contain several statements that plainly indicated a plan and agreement to keep the conspirators' unlawful conduct secret. One such entry noted that no agreements should have been

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[5] The memorandum contains additional statements noting the market-wide effect of the illegal agreement. *See id.* ("If we break the coop now it is likely to take a long time to put it back together. In my opinion it will slow the market recovery. . . . If you add it all up it is difficult to see the sense of going to 'war'. . . . [A] net gain from going to war is not easily seen. If we do go to war we may want to fix COA's [contracts of affreightment] for longer periods, now we believe the market is improving and therefore we go for shorter periods with fixed rates.") (emphasis supplied).

[6] The Complaints describe additional acts of the Respondents that further effectuated the conspiracy.

memorialized, and another entry noted not to give outsiders the impression that Stolt and Jo were colluding.

10. The Respondents' efforts to conceal the conspiracy ultimately failed. In early 2003, Stolt, Odfjell, and Jo announced that they were the subjects of surprise raids undertaken by antitrust investigators of the European Commission (Stolt and Jo) and the European Free Trade Association (Odfjell). *See* Feb. 19, 2003 Stolt-Nielsen S.A. Press Release (attached as Exh. O); Feb. 19, 2003 Jo Tankers Press Release (attached as Exh. P); Feb. 19, 2003 Odfjell ASA Press Release (attached as Exh. Q). The companies' February 2003 press releases indicated that the purpose of the investigations was to ascertain whether there was evidence of unlawful market sharing or a cartel agreement and related illegal practices for deep-sea maritime tanker services. *See* Feb. 25, 2003 Stolt-Nielsen S.A. Press Release (attached as Exh. R); Feb. 20, 2003 Odfjell ASA Press Release (attached as Exh. S).

11. In January 2003, the DOJ granted Stolt conditional amnesty from prosecution and fines for violation of U.S. antitrust laws under its Corporate Leniency Program with respect to certain of the activities alleged in the Complaints regarding parcel tanker operations. *See* Findings of Fact ¶¶ 56, 62-63. Stolt also was granted conditional immunity from imposition of fines by the European Commission. *See* Feb. 25, 2003 Stolt-Nielsen S.A. Press Release. As part of its entry into the Amnesty Program, Stolt admitted wrongdoing and provided the DOJ with evidence -- including the aforementioned customer allocation lists and testimony from two of its executives that explained how Stolt and Odfjell exchanged them -- that led to guilty pleas from its two biggest competitors and several of their executives. *See* Mem. and Order, *Stolt-Nielsen S.A. v. United*

States (E.D. Pa. Jan. 14, 2005) ("Mem. and Order") (attached as Exh. T) at 8-9.[7]

12. In October 2003, Odfjell, as well as two of its executives, Erik Nilsen and Bjorn Sjaastad, pled guilty to participating in a conspiracy from at least as early as August 1998 through November 2002 to suppress and eliminate competition by allocating customers, fixing prices and rigging bids for parcel tanker shipping of products to and from the United States and elsewhere in violation of the Sherman Antitrust Act, 15 U.S.C. § 1. *See* Findings of Fact ¶¶ 73, 75, 77-78. In connection with their plea agreements, Odfjell was placed on probation for five years and fined $42.5 million, Nilsen was incarcerated for three months and fined $25,000, and Sjaastad was incarcerated for four months and fined $250,000. *See id.*

13. Soon thereafter, Jo and one of its executives also pled guilty. In January 2004, Hendrikus van Westenbrugge pled guilty to participating in a conspiracy from January 2001 through November 2002 to suppress and eliminate competition by allocating customers, fixing prices and rigging bids for parcel tanker shipping of

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[7] In June 2003, after removing Richard Wingfield, a former Stolt executive, from the Amnesty Program, the DOJ charged him with participating in the conspiracy between March 2001 and October 2002. Mem. and Order at 9. In March 2004, the DOJ notified Stolt that it intended to revoke Stolt's amnesty and indict it because Stolt allegedly misrepresented that the conspiracy ended in March 2002, and not November 2002, as subsequently discovered evidence demonstrated. *Id.* at 9. Stolt and Wingfield then sued the DOJ to enjoin it from revoking amnesty. *Id.* In January 2005, the Eastern District of Pennsylvania granted their request. *Id.* at 16. The DOJ has appealed this ruling. *See* Notice of Appeal, *Stolt-Nielsen S.A. v. United States* (E.D. Pa. Feb. 14, 2005), at 1-2.

products to and from the United States and elsewhere in violation of the Sherman Antitrust Act. *See id.* ¶ 78. In April 2004, Jo pled guilty to the same charges from at least as early as the second half of 1998 through November 2002, and was placed on probation for five years and fined $19.5 million. *See id.* ¶ 76.

14. The Respondents' global price-fixing conspiracy caused the Claimants and the proposed Class to pay supracompetitive prices for transportation of bulk liquid chemicals, edible oils, acids, and other specialty liquids on trade lanes around the world during the relevant time period. In recommending Odfjell's sentence for its role in the conspiracy, the DOJ noted that the affected volume of U.S. commerce for Odfjell alone was nearly $217 million. *See* Gov't Sentencing Mem. and Mot. for a Guidelines Downward Departure, *United States v. Odfjell Seachem AS*, Criminal No. 03-654 (E.D. Pa. Oct. 16, 2003) ("Odfjell Sentencing Mem.") (attached as Exh. U) at 7.[8] As to Jo, its affected volume of U.S. commerce was approximately $143 million. *See* Gov't Sentencing Mem. and Mot. for a Guidelines Downward Departure, *United States v. Jo Tankers, B.V.*, Criminal No. 04-221 (E.D. Pa. May 12, 2004) ("Jo Sentencing Mem.") (attached as Exh. V) at 8.[9] Despite

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[8] This figure was derived using a fairly restrictive definition of U.S. commerce, only including "shipments to and from the United States" that were "billed to a U.S. customer." *See id.*

[9] Because Odfjell and Jo provided the DOJ with evidence and cooperation concerning the full scope of the conspiracy, the DOJ chose not to include Odfjell's and Jo's affected volumes of commerce from March 2002 through November 2002. Odfjell Sentencing Mem. at 7 n.3; Jo Sentencing Mem. at 9 n.3. Accordingly, their affected volumes of U.S. commerce for the entire Class Period --

(and, in part, due to) the enormous damages that purchasers suffered as a result of these conspiracies, the DOJ did not seek restitution through sentencing procedures, noting:

> [A] number of civil suits have been filed by potential victims against [the Respondents] and other parcel tanker shipping companies. In light of the pending civil actions and because of the complicated nature and large number of contracts involved, the Government respectfully submits that determining the amount of the victims' losses would complicate or prolong the sentencing process . . . .

Odfjell Sentencing Mem. at 9; Jo Sentencing Mem. at 11 (footnote omitted). Indeed, the DOJ expressly cited the civil suits that spawned this arbitration demand as a reason it was not seeking restitution in sentencing Odfjell and Jo (the related claims were pending in various courts when they were sentenced). Odfjell Sentencing Mem. at 9; Jo Sentencing Mem. at 11 & n.5. Moreover, Stolt expressly has "agreed . . . to make restitution to any person or entity injured as a result of the activity in which [it] participated." Findings of Fact ¶ 64. Similarly, Odfjell and Jo have agreed to pay restitution to their victims if ordered to do so. *See* Plea Agreement, *United States v. Odfjell Seachem AS*, Crim. No. 03-654 (E.D. Pa. Nov. 3, 2003) (attached as Exh. W) at ¶¶ 4, 6(a); Plea Agreement, *United States v. Jo Tankers BV*, Crim. No. 04-221 (E.D. Pa. June 9, 2004) (attached as Exh. X) at ¶¶ 4, 6(a). The Claimants thus demand arbitration to resolve their claims.

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which the Claimants will show through discovery -- necessarily are greater than the figures that the DOJ provided.

II. PLACE OF ARBITRATION

15. The Claimants designate New York, New York as the location of the arbitration proceedings.

III. CLAIMANTS' DESIGNATION OF ARBITRATOR

16. Pursuant to the Class Arbitration Agreement, the Claimants hereby designate as their arbitrator:

Kenneth R. Feinberg
The Feinberg Group, LLP
The Willard Office Building
1455 Pennsylvania Avenue, NW, Suite 390
Washington, DC 20004-1008

Pursuant to Paragraph Five of the Class Arbitration Agreement, the Representation of Kenneth R. Feinberg and the specified materials that he is required to submit are attached as Exhibits Y and Z, respectively.

IV. RELIEF REQUESTED

17. The Claimants seek relief as follows:

(1) That the Arbitrators determine that this proceeding may be maintained as a class arbitration consistent with Rules 23(b)(3) of the Federal Rules of Civil Procedure, with the Claimants denominated as class representatives and their counsel appointed as co-lead counsel for the Class;

(2) That the unlawful contract, combination and conspiracy alleged by the Claimants be declared an unreasonable restraint of trade or commerce in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1;

(3) That the Claimants and the Class recover treble damages as provided by United States law;

(4) That the Claimants and the Class recover their costs, including attorneys' fees, as provided by United States law; and

(5) That the Claimants and the Class be awarded such other and further relief as the Arbitrators may deem just and proper.

Dated: May 19, 2005
New York, New York

* * *

CLAUSE CONSTRUCTION HEARING

TRANSCRIPT EXCERPTS

[CAJA A1968, Lines 0011-7 –
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MR. PERSKY: I'm Bernard Persky of Labaton Sucharow, I'm speaking about the [clause] construction award motion.

As a prefatory matter, we wanted to note that the respondents have an intent to possibly put on a witness or two for affirmative testimony. We have no problem with their — we'll stipulate that what they've sworn to is what their submitted testimony is. We don't see any necessity for actual testimony from these witnesses and unless the panel has any questions of them, our view is that affirmative testimony would be unnecessary.

ARBITRATOR JENTES: Does that mean that you agree with everything they say?

MR. PERSKY: No, we do not.

The arbitration clause here is a silent clause to class arbitration. All the parties agree that when a contract is silent on an issue there's been no agreement that has been reached on that issue, therefore there has been no agreement to bar class arbitrations. All the parties also agree that the arbitration clause is unambiguous.

Why do I say that? Well, in point 1 of respondent's brief, they so argue and Mr. Kimball at paragraph 14 and Mr. Harris at paragraph 10 have also agreed that the contract is unambiguous.

In the absence of unambiguous terms, there should be no extrinsic evidence that would be necessary. There's no need for any evidence or testimony from Messrs. Kimball or Harris, it is an integrated contract with specific information concerning that contract, it is really not needed by this tribunal.

In any event, Messrs. Kimball and Harris are submitted as experts and their affidavits are submitted for your review, but they are offering their opinions here on the ultimate issues to be decided by this tribunal.

Look at paragraph 18 of Mr. Harris's affidavit and paragraph 18 says, "I've been asked to opine on whether the standard as to the tankline and Vege Oil arbitration clauses supports a construction permitting a class arbitration."

Mr. Kimball in paragraph 13 says, "I've been asked to provide my opinion as to whether the standard as to tankline or Vege Oil arbitration clauses support a construction permitting class action arbitration."

Well, such court expert opinions are expert opinions on the ultimate issue that's to be decided by this tribunal. In a court of law, that would be impermissible and we respectfully suggest that it should not — it should be ignored here by the tribunal.

And in support of our assertion that the court of law would not permit it as the Black Letter Law and I will just give one citation to one case that so states, it is Yannakopolis versus General Dynamics Corporation, 75 F.3rd 1298, (Eighth Circuit, 1996) and expert opinions on an ultimate issue is to be excluded.

Now, what is the respondent's basic position here? In our view, they are seeking a special rule governing maritime disputes. However, this arbitration doesn't

involve a maritime dispute, the issues here instead involve an international conspiracy to divide markets, allocate customers and price fix a parcel tanker shipping services.

The dispute here is quite unlike the stranding of vessels, collisions at sea, lost cargo or any other maritime type claim. Rather, claimants and other class members have been forced to pay super competitive rates. What are super competitive rates? The amount actually paid exceeds what they would have paid, but for respondent's anti-competitive activities, by all class members, claimants and absent class members alike who use respondent's parcel tankers that during the class period were economically injured. There is no special maritime issues involved. Respondents shouldn't be exempt from the rules that now govern class arbitrations.

It's also undisputed that the arbitration clause here contains broad language and this language should be interpreted to permit class arbitrations.

Use of the singular terms in the clause are irrelevant, it doesn't preclude class treatment here, that was held by both the Basel case and the numerous AAA awards rejecting this same argument. The clause also uses the term any and all differences and disputes of whatever nature. That would include class arbitrations. Use of any normally means all and includes class arbitration except unless expressly excluded. And for this, we also cite the Milstein arbitration award number 17 in our appendix.

The parties here have expressly adopted the AAA's supplemental rules governing class arbitrations, specifically rule 3. The AAA promulgated its class arbitration rules right after the Supreme Court's decision

in Basel. Since Basel, and the AAA's adoption of the supplemental rules, more than a score of class construction awards have been issued and published under rule 3 by the AAA.

It is undisputed that every one of these 25 or more written published awards was expressly held by the arbitrators that a silent broadly worded arbitration clause, just like the one at issue here, should be construed to permit class arbitration.

ARBITRATOR JENTES: Could I interrupt you at this time? I, like the other panel members, have read through all these long lists. Most of them candidly don't seem to have much relationship to the kind of situation we have here in the sense that they are not international and they are not commercial involving major transactions. And I'm just wondering what's the best cases you have?

MR. PERSKY: Well, we think it's the wording that really matters —

ARBITRATOR JENTES: No, what's the cases that you've cited in the 25 that are the closest to what our case is?

MR. PERSKY: Well, they involve the various industries, industries that are national and to some extent international in scope. And the arbitration clauses that are being interpreted in those awards all involve language which is similar. The commerce involved is perhaps not necessarily international, but the wording of the clauses themselves are similar. So the parties' intent would be the same, and that is any and all disputes.

ARBITRATOR JENTES: You don't think it makes any difference whether it is international or not?

MR. PERSKY: The only aspect of the international portion of this arbitration that may come into play is the issue raised by the defendant of the respondent's concern that people in other countries may not have consented to be a part of a class arbitration. But the AAA's rules, we believe, take care of that.

If and when there's a clause construction award and if and when there is a class certification decision, what then happens is notice will be mailed out to the addresses of each and every absent class member. They will have an opportunity to decide whether or not they wish to be part of these proceedings by being afforded the opportunity to opt out of these proceedings, so that's the only difference here in our view.

There's no special maritime rule. The maritime industry has been subjected to class actions in court, there's no particular reason why the maritime industry should be exempt from the traditional rules that now govern class arbitrations.

The major difference is, as I said, consent. That is taken care of in two respects. One, the ability to opt out, and two, the AAA's rules provide duplicative judicial review. There is judicial review at the clause construction award stage, and there is judicial review at the class certification stage. Due process is protected, consensus insured.

ARBITRATOR JENTES: Let me pursue this matter. Most of the matters seem to involve in these 25 cases what I would call consumer type situations. And most of them seem to be negative value cases. Does it make any difference that this may not be a negative value case, and do you know whether or not it's a negative value case?

MR. PERSKY: Number 1, many of the arbitration awards that we've cited involve statutory claims, the Truth and Lending Act and Title 7 of the Civil Rights Act.

ARBITRATOR JENTES: Those are essentially consumer non-value cases.

MR. PERSKY: The customers of the respondents here vary all over the lot. Some are large companies that have commenced their own arbitrations. I submit that the vast majority have disputes which are negative value disputes. It would cost them, the vast majority of absent class members, and indeed the current claimants, well, more to litigate the matter on an individual basis than they could recover.

An antitrust case, particularly involving an international cartel which is extraordinarily difficult and expensive to litigate. I do this for a living, it takes a lot of time, and money, the hiring of experts. And many shippers wouldn't engage in the process. And these respondents would then get off scot free for having committed felonies.

It is not fair to exempt them from the liability that they've represented to the federal court that they would honor. They represented to the federal courts that they would pay restitution to their customers. And that's one of the reasons they got whatever sentences they got.

The only way they will have to pay restitution here to the vast majority of people here injured by their illegal conduct is if we get certified and we move forward with the class arbitration. So yes, the answer to your question very directly is the vast majority in our — my opinion of claimants here, absent class members have

negative value claims. If by negative value, meaning it costs more to litigate than you would get if you won. Is that what you mean by negative value?

ARBITRATOR JENTES: That's correct.

MR. PERSKY: The answer is yes.

ARBITRATOR JENTES: Do you have any evidence on that?

MR. PERSKY: I'm not going to put in an affidavit as an expert, but I've litigated cartel cases for 37 years.

ARBITRATOR JENTES: I take it there is no evidence one way or the other on this?

MR. PERSKY: It is in the record that we've asserted that negative value that the absent class members would not proceed forward. And indeed some of them may be fearful of stepping forward because of the possible cessation of indispensable and necessary services they need to conduct their operations. A class action provides them with the relief that they would be entitled to.

CHAIRMAN AKSEN: No restitution, I take it, means treble damages?

MR. PERSKY: That's up to the tribunal. We would say yes, it's conceivable, depending on the applicable law.

CHAIRMAN AKSEN: Your definition of restitution, making your clients whole would include treble damages.

MR. PERSKY: Possibly.

ARBITRATOR FEINBERG: The Sherman Act then?

MR. PERSKY: The Sherman Act would involve treble damages, making the clients whole, to give them the damages they are entitled to under the law, which would be treble damages because it has been held that it is so difficult on occasion to prove the aggregate damages suffered by a class on an antitrust case, that's why Congress has created the treble damages remedy to make up for that uncertainty in the amount of damages.

CHAIRMAN AKSEN: Well, isn't that remedy created for Americans for American disputes and U.S. cases rather than somebody from Singapore or Hong Kong or the like?

MR. PERSKY: Not necessarily, and that will be the subject of some other motion —

CHAIRMAN AKSEN: I understand. These motions have an interrelationship that I have found. One of the frustrations I had in reading the briefs is segregating them. As a lawyer, you did a great job from point A to B, point C to point D. When I put it together in a lump, I found I couldn't so separate them.

MR. PERSKY: Well, let's take the simplest things first. The arbitration clause is straightforward, it has been uniformly held where a class proceeding is not excluded from those words, it's uniformly been interpreted to permit a class proceeding to move forward.

The major concern perhaps in an international or transnational arbitration is what about folks in some other legal systems? They will be getting notice and they can decide if they want to proceed. If they don't want to proceed, they'll opt out. So this will be purely consensual. The defendants have essentially cited con-

solidated cases against us. Consolidation is completely different.

In a consolidation motion, what you have are separately commenced arbitrations, people who have determined I want to go my own route, I'm beginning my own arbitration, I want my own arbitrators, I have my own dispute. Somebody else comes along and says, no, no, no, we want to bring you all together against your own will. Consolidation is very different than what we have here.

In addition, contrary to the respondent's brief, consolidation in fact has been permitted in some federal courts. There is a First Circuit case that I think they themselves have cited.

More importantly, the New York Court of Appeals has ordered consolidation of disparate arbitrations. Why is that important? The arbitration clause here provides that the law of the forum governing arbitration shall be applicable. And the New York Court of Appeals has permitted consolidation.

ARBITRATOR JENTES: You talked about opting out as being the option. Do you think the panel has the ability to require opting in?

MR. PERSKY: Yes. When Professor Kaplan wrote the advisory committee notes to Rule 23, he was my professor in law school. We actually had a discussion about that. The federal rules were specifically written not to require opting in as they changed the old spurious class actions to Rule 23 (b)(3) classes.

But in arbitration, if the tribunal deems it essential to protect the absence of class members, we don't think so — we think the procedure we're proposing requiring

opting out is best, but I respectfully submit that you have the discretion to require opting in.

ARBITRATOR FEINBERG: Have you developed very much, assuming that a class is appropriate, big assumption, one, the definition of the class, two, the number of class members that are clearly domestic or have domestic ties to the United States, versus international or foreign, not international, foreign that would be members of the class? And have you done much work in terms of trying to liquidate the damage that would be appropriate on the class?

MR. PERSKY: Well, number 1, we believe domestic class members could be in the hundreds, but it depends what you mean by domestic. There could be class members that ship to and from the U.S. who are not domestic who we think would be covered.

Two, have we done much to develop the dollar amounts? We haven't gotten discovery, but in allocutions in Federal Court, at least two of the defendants have allocutions and would-be guilty pleas and testimony before the sentencing judge.

Two defendants indicated the U.S. commerce involved in their plea was a few hundred million dollars each, I may not have the exact numbers but together they were about $400 million, just for two. And the — I imagine the Department of Justice was talking U.S. commerce and not international commerce, but I don't know. The short answer is I don't know.

ARBITRATOR FEINBERG: Maybe I missed it in the few pieces of paper that passed my desk in this case, but have you somewhere defined the class?

MR. PERSKY: Yes.

CHAIRMAN AKSEN: You did?

MR. PERSKY: It is in our demand for arbitration.

ARBITRATOR FEINBERG: In the demand you defined the proposed class if we find the classification.

MR. PERSKY: Yes.

CHAIRMAN AKSEN: Okay.

ARBITRATOR JENTES: One other question on what we know and don't know. I sort of have this vague sense that under the ICC and under the LCIA, there has been no request for a class action type arbitration. You find — do we know whether that's true and does that tell us anything about what people expect who are operating in the international world of commerce.

MR. PERSKY: That is new and I expect that you will see a lot more of it, number 1. When you talk about expectations, virtually every one of the arbitration clauses that were the subject of the 25 AAA decisions were drafted before Basel. So therefore, if you are going to talk about the parties' intentions, pre-Basel class arbitrations were not common, post Basel they are common to AA —

ARBITRATOR JENTES: Wait. If that's true, why aren't they being requested in ICC proceedings and requested in LCIA proceedings at any of the other arbitrable bodies that are out there administering?

MR. PERSKY: They need good lawyers, number 1 —

ARBITRATOR FEINBERG: And the creativity.

MR. PERSKY: They need good lawyers, number 1. And number 2, they will because Basel is new.

ARBITRATOR JENTES: So the lawyers in London are not very good?

MR. PERSKY: No, we have representative actions and class actions have a storied history under the common law and I think —

ARBITRATOR JENTES: Well, haven't there been equity actions under English law that are quote, class actions or a little different from ours?

MR. PERSKY: But those — all the more reason you can expect them under the international arbitration rules because they are known even under the British common law. And you will expect that you will see them, it just hasn't happened yet.

ARBITRATOR JENTES: Okay.

CHAIRMAN AKSEN: Do you have much more, Mr. Persky?

MR. PERSKY: In conclusion, this tribunal should be guided by no more than 25 arbitration awards under AAA rule 3 holding that an arbitration court, which has broad and sweeping language and which is silent as to class proceedings should be interpreted to permit a class proceeding.

CHAIRMAN AKSEN: Last question before I switch to the other side. I realize that all of us as lawyers understand all the precedents in prior court decisions. Are you telling me that this tribunal is bound by the 25 previous decisions of other arbitrations?

MR. PERSKY: No, but I believe they provide a road map and are intensely instructive to this tribunal. You can look at each fact situation differently, but look at each arbitration panel's reasoning as to how they came to this conclusion. They take different routes,

they don't all say the same thing, but they come to the same conclusion and that we respectfully suggest that you should, too.

ARBITRATOR JENTES: But back to the question Mr. Feinberg asked, with regard to the question — in paragraph 2 where you define what the class is of the demand?

MR. PERSKY: Yes.

CHAIRMAN AKSEN: Mr. Cherry?

MR. CHERRY: Yes. First of all, we believe that the claimants are misreading Basel. Basel — they contend that Basel says unless you have an express prohibition in your agreement against class arbitration, then class arbitration should be remitted.

CHAIRMAN AKSEN: Isn't that the general rule in arbitration?

MR. CHERRY: No. What Basel says is that the contract interpretation issue is left up to the arbitrator, that's the rule in Basel.

CHAIRMAN AKSEN: Isn't the rule unless we can show with positive assurance?

MR. CHERRY: No. That was the rule under South Carolina law according to the South Carolina Supreme Court. In Basel the South Carolina Supreme Court says that is their rule under South Carolina law, that if you don't expressly exclude it, they will read it into your contract.

They then said the contracts before them were silent so they read it into the contract. The Supreme Court said that the first part of that holding is state court, we're not going to touch that, that's up to you. The second part, whether these contracts are silent,

you never should have gotten to. That's for the arbitrators, not for the court.

In this case, we are not entitled to South Carolina, we don't care what the South Carolina Supreme Court said. The issue is what was the intent of the parties under our contracts. That has always been the issue, that wasn't changed by Basel. The only thing Basel says is that you decide, not the District Court.

CHAIRMAN AKSEN: So if we decide, that's within our discretion?

MR. CHERRY: The decision is for you. In the first instance, we have the right to review before the court, but we're here today for your construction of our common pleas.

CHAIRMAN AKSEN: What do we make of the parties calling a submission, to agree to this procedure? What impact if any does that have —

MR. CHERRY: It has absolutely no impact. First of all, the AAA rule sales you cannot consider the existence of these rules, our agreement. Our New York arbitration procedures agreement expressly says nothing in this agreement bears on any of these issues about class action, any, we're not changing any rights, we're just trying to — we need to have this decided, this was just a way to facilitate that.

And notably, none of that's in the contract, the parties here didn't contemplate AAA. Back in 1998, 2000 there were contracting agreements, AAA doesn't appear in anything, but you're not supposed to consider that anyway.

In fact, the one case that ever did that, which they rely upon, Goldstein versus Ibase, the U.S. District court said you need to go back and look at the agree-

ments, the context and whatever else you want to look at in determining, not the AAA rules. And then you decide whether these contracts contemplate the District Court in Connecticut, whether they contemplate a class action or not.

ARBITRATOR FEINBERG: Steve, are we supposed to look at context?

MR. CHERRY: Yes.

ARBITRATOR FEINBERG: Even if the language is clear, explicit and extremely broad?

MR. CHERRY: There are several issues in that question.

ARBITRATOR FEINBERG: Yes.

MR. CHERRY: At first, yes, you always look at the contract. There is a difference between extrinsic evidence and custom and practices. The case — including cases in the Second and Third District and the State of New York both say that you always look at customs and practices to interpret the contract, even to determine if there is any ambiguity.

The issue isn't how our mothers would read the contract, it's how our clients read the contract. And so you need to put yourself in their context. That's different from having witnesses come in and say, well, I told him X, Y, Z, he told me A, B, C and even though he didn't write it down, he really meant it this way or that way. That's extrinsic evidence.

We're talking about recognizing how the industry works, how the parties do business. The fact that they negotiate these contracts with each other, have done that over generations, that they arbitrate all their disputes in an individual arbitration, that they always

have done that, that's what they provide for, it's what they expect.

They don't allow consolidation, they certainly don't allow class action. And that's why you haven't seen it, because that's not how this industry works. These are not consumers, they are all large, multinational, sophisticated companies and that's the proceeding they want.

And they provide the arbitrators in London and New York and some of the arbitrators in Singapore or elsewhere with their convenient helping of the bar and the arbitrators that they expect generally the same international maritime arbitration wherever they go. They don't expect if they go to New York all of a sudden they are sucked into some U.S. litigation style class action. That's certainly not what any of these parties anticipate.

Now —

CHAIRMAN AKSEN: And if so, why not let the court or the arbitrators decide that?

ARBITRATOR JENTES: The circuit court —

MR. CHERRY: The arbitrators are to —

ARBITRATOR JENTES: It's a non-arbitrable issue of the U.S. Supreme Court.

MR. CHERRY: Well, first of all, the Supreme Court in Basel was not faced with our contracts. And what the court said is we are not supposed to construe the contract, given the context, given the customs and practices, that's for the arbitrators.

All the court does is deal with the gateway issues, is there a contract to arbitrate, does it cover, in this case, the Sherman Act. If so, it goes to the arbitrators, you guys read the contracts and you figure out the pro-

cedures that apply, whether we contemplated having a class action or not.

CHAIRMAN AKSEN: Every Supreme Court case that deals with a statutory claim in my lifetime, the federal courts seem to be saying to all of the arbitrators, whether it is RICO, antitrust, security patents, everything seems to be, let the arbitrators decide it.

What impact, if any, does that have on us once we get down to the issue we're faced with here?

MR. CHERRY: It has no impact. There is a difference here which they might claim what the claim is and what the procedures that are used to address that claim.

CHAIRMAN AKSEN: The claim is your clients were violating the Sherman Act?

MR. CHERRY: Yes, and that's plainly arbitrable, the Second Circuit said it, that's arbitrable. The number of Supreme Court cases, Second Circuit and Third Circuit cases including JLM say there is a broad policy in favor of arbitration.

But the same cases in the same court say there is no federal policy favoring arbitration under a certain set of procedural rules. Federal policy is simply to ensure the enforceability according to their terms of private agreements to arbitrate. Numerous courts, federal and state have said —

CHAIRMAN AKSEN: But it wasn't antitrust, it was a California statute, that's a little different from what we have here.

MR. CHERRY: Absolutely. Well, for instance, in this case, the Second Circuit when they were trying to avoid arbitration, they argued this case does not have

to be arbitrated, because if we have to arbitrate we will have to pursue individual arbitrations for all the claimants, that would be unfair, so we shouldn't have to arbitrate.

The Second Circuit looked at that and they didn't say, no, you're going have a class action arbitration. They said, we don't care, that is not the issue, we enforce arbitration agreements according to their terms.

So they understood what the ramifications were of having to arbitrate. That was post Basel when the Second circuit said that. This idea of a class action arbitration has come up after that and they knew it. That's why they fought arbitration so hard because they knew they were going to have to have individual arbitrations. That's what they told the District Court and what they told the Second Circuit, so Basel has not decided this. All Basel said is, you decide, subject to the court rule.

ARBITRATOR JENTES: You started out and slightly restated what Breyer has said. Breyer at least says on several occasions in Basel that the issue was whether the contracts forbid class arbitration.

MR. CHERRY: Because they were deciding that, because you were facing that factual issue in the context of the South Carolina law, and as decided by the South Carolina Supreme Court which said, if you don't forbid it, it's allowed. They didn't touch that issue because that's a matter of state law for the state court to decide.

ARBITRATOR JENTES: How would you state the issue if you don't agree with Breyer's statement?

MR. CHERRY: That the arbitrators are to construe the contract in the con — in the context of the

governing, usually that's going to be state contract law. And that's what their case —

ARBITRATOR JENTES: No, no, no, you're ducking the question, what's the issue? They construe it in the context and all that kind of stuff. What's the issue?

MR. CHERRY: What do the parties intend in this contract. Basic contract interpretation. And it's for you to decide. And a number of their cases say expressly, Basel changed nothing, other than that the arbitrator decides bottom line what did the parties intend.

ARBITRATOR FEINBERG: Under state contract law in New York, isn't it under New York state law, isn't this language to be interpreted broadly to permit a class in light of what the language says?

MR. CHERRY: No, no. That's another thing. The language that you're interpreting broadly, or that they are urging you to interpret broadly in any — first of all, they are looking at the tanker agreement, two of the three are governed by a different agreement. But it says any dispute, any dispute.

ARBITRATOR FEINBERG: Whatsoever?

MR. CHERRY: No. One of the agreements says that, two of them don't. And maybe we should get that in front of us. But in fact, that's a good idea to get the language in front of us, but that's the claim, it's up to the arbitration, that's what the court addresses. That's not the procedures that are used by you.

And if you read the agreements and take them out there, they talk about — they define who is the charter, they say who that is, who the charter is, who the owner is. Let's look — let's start by looking at KP's agreement.

ARBITRATOR JENTES: I'm sorry, what in this thing are we supposed to be looking at?

MR. CHERRY: There's one of their contracts on each of these. And let's — let's look at Stolt tankers and Kohap, Kohap is a predecessor. And on the fourth page of the arbitration clause, it says, "any dispute arising from the making, performance or termination of this charter party shall be settled in New York, owner and charter each appointing an arbitrator who shall be a merchant, broker or individual experienced in the shipping business. The two thus chosen shall nominate a third arbitrator who shall be an admiralty lawyer. Such arbitrations shall be conducted and performed with the revisions and procedures of the United States Arbitration Act, and a judgment of the court shall be entered upon any award of said arbitrators. Nothing in this clause shall be used in the way of owner's rights that freight that's been emerged."

And then it provides actually unique procedures if you do have a small claim. It says, United States — for disputes involving less than U.S. $25,000, SMA simplified arbitration procedures shall be used.

So that's the agreement that KP Chemicals has. The others are slightly different but they all contemplate a charter that's clearly defined in the contract. They contemplate arbitration of the disputes involving this contract. It doesn't mention any other contracts, they don't mention the relationships to the parties generally. And getting back to some of what they said besides misconstruing what Green Tree provides, they rely upon a number of inapplicable cases. These are cases that are all consumer cases, they are all contract cases. And time and again —

CHAIRMAN AKSEN: Is this a case of first impressions?

MR. CHERRY: Yes. Time and again, what those arbitrators did—

CHAIRMAN AKSEN: Then we don't need that. If it is a case of first impression, then there are 25 others. Because once you concede that, we know what our problem is.

MR. CHERRY: Well, let me just point out, please —

CHAIRMAN AKSEN: If you made a good point, rest on that and move on.

MR. CHERRY: Let me give you a couple of examples, Smith v. TeleTech. This is a difficult case, it is an employment case under the Fair Labor Standards Act.

CHAIRMAN AKSEN: That has no relevance to what we're —

MR. CHERRY: It has no relevance — here is what they do, here is what the arbitrators do, they say this is a contract with adhesions. So I'm going to construe it strictly against the draft of that big corporation against the poor individual who is unrepresented, has no experience with this whatsoever. And then they look at the agreement and they find any ambiguity that looks like — not just at all, but it looks like it contemplates a representative action.

So in Smith v. TeleTech, there is language in there that says the arbitrator has the power to award any relief that may be authorized by law. And more importantly, to enter appropriate orders to maintain or enhance the efficiency of the arbitration process, to avoid unnecessary costs and delay.

And there the claim itself, the Fair Labor Standard Acts claim statutorily provides for a class action. And the arbitration agreement says it is not intended to affect or waive the substantive rights of the company or the employee.

Time and again, you look at their cases — first of all, it is a contract with adhesions so we're going to construe it against the drafter. So they look at the agreement and they find language like this.

There are a number of Snap-On-Tool cases. There you will find the same thing, a contract with adhesions was construed against the drafter, what does the agreement say? It talks about claims can be brought in the right of or on behalf of — that's a quote — of the franchisees, and by people claiming through a franchisee.

They say, look, you are contemplating a representative action, it is at least ambiguous, it's a contract of adhesions so we're going allow it. That's completely different here. Here we have commercial, sophisticated multinational parties, they negotiate these contracts, they —

CHAIRMAN AKSEN: Okay, I think we understand that.

ARBITRATOR JENTES: What about Mr. Persky's comment that he believes that at least a goodly number, let me frame it that way, of these contracts are negative value contracts?

MR. CHERRY: No. As to cases the courts have addressed that issue, even in consumer cases, the vast majority of courts reject that argument. They say there are treble damages here and a statutory right to attorneys fees. You're not going have a problem find-

ing a lawyer in that case, you're going to get treble damages and you are going to get attorney's fees so that's not an issue.

What's more is these are not mom-and-pop chemical companies on the corner. These are big, multinational companies, we've shown you who these claimants are, they say they are some of the smallest. They claim on the website to be some of the biggest companies in their industry. If you look on the PowerPoint there, it is lifted right off of their website. They talk about —

ARBITRATOR JENTES: No, no, I understand as to them. What I'm talking about is Mr. Persky's sense that there are a lot out there who aren't very big in amounts involved in —

MR. CHERRY: It is not true. These are big, multinational chemical companies, these are not mom-and-pop outfits and they negotiate these contracts and they have brokers negotiate for them. They all arbitrate, that's how they resolve disputes and they arbitrate disputes very small and very large and generally don't provide for attorneys' fees and don't provide for treble damages. But that's how they resolve their disputes and that's how they will do it here.

You asked if there was any evidence of their negative value and they didn't have any. But we do have evidence and that's the fact that over a dozen of these companies are arbitrating with us right now. They've come forward, they are asserting their claims, some are smaller than these guys, some are bigger than these guys. That's how they assert their claims, that's how they expect to assert their claims and they didn't want to have anything to do with this. They wanted to assert their claims as they agreed to do. And so this is

not a negative value case, it is certainly not a consumer oriented negative value contract negotiation.

ARBITRATOR JENTES: Other than the one respondent that we had with Niz early on that initiated an arbitration in London, have the respondents initiated any arbitrations outside of New York?

MR. CHERRY: No. We've heard talk of doing that, but —

MR. CARNEY: The respondents have, yes.

MR. CHERRY: Sorry.

ARBITRATOR JENTES: They initiated them in London.

MR. CHERRY: Stolt-Nielsen has asserted a claim for arbitration on JLM similar to the one in the Niz situation, that's the only one I'm aware of.

ARBITRATOR JENTES: Have any of the potential claimants, let me phrase it that way, initiated arbitrations outside of New York?

MR. CHERRY: No, they have not done so, but we have heard of such proceedings coming, but they haven't done so and there are no other proceedings except the JLM.

ARBITRATOR JENTES: The claimants make much of "the efficiencies associated with the class action." What's your response to that?

MR. CHERRY: First of all, I disagree with it.

ARBITRATOR JENTES: Well, I know, but why?

MR. CHERRY: Well, I disagree with the fact that it is efficient, first of all. And I disagree with the fact that it is relevant.

First of all, any one of the claimants could have had their disputes resolved over a year ago if they had come forward, asserted their claim, had it arbitrated, it would be done and over with.

What they have done is they wasted a lot of time trying to avoid arbitration and now trying to have a class action. It has nothing do with the maritime claim and that's what the claimants who are coming forward say — and believe me, they just want to have their dispute resolved, and so I don't think that this is in any way efficient.

Second is the cases uniformly say efficiency doesn't matter, we enforce the agreements according to their terms. And the Supreme Court has said that, the Second Circuit has said that, that that is not a consideration. You have to construe the contract decision with the parties' intent and enforce this contract according to its terms.

They say that consolidation is somehow irrelevant here, which couldn't be further from the truth. As one of their own cases said, the class action is merely consolidation on steroids.

ARBITRATOR JENTES: I kind of like that.

MR. CHERRY: Yeah, I mean, the issue is do you read the contract and resolve these disputes in private arbitration to consolidate it. If you can't consolidate, you certainly can't have a class action.

They referred to one case, they found a 1970 case that allowed consolidation. Of course, that case predates the matters here and the Second Circuit case and all the other federal cases that said you can't have consolidation by a good number of years.

It is also a unique situation where basically an indemnification claim arises from the same transaction. You have one party of the contract, another party has been contracted and another party and by the one voyage, the ship was damaged. They claim it is basically the same transaction, but the main thing is it was 30 years before the relevant — and before any of the federal cases could be relied upon.

CHAIRMAN AKSEN: Do you consider this a maritime arbitration?

MR. CHERRY: Yes.

CHAIRMAN AKSEN: Why?

MR. CHERRY: As the —

CHAIRMAN AKSEN: Let me give you my definition of maritime arbitrations from certain points of view. The maritime arbitrations that I've seen over the years have several things in common. One of the most striking is that most of the arbitrators are not lawyers, because usually the issue in dispute in the case is a practical business trading ship issue. In this case, I don't think we could have three non-lawyer arbitrators deciding the issues before us.

Secondly, the average maritime arbitration that I'm aware of, the arbitrator could get 100 cases a year. I have a friend in New York that I served with, a former president of the Maritime Arbitrators Association told me he's had about 10,000 maritime arbitrations because there is a similarity with each one. I don't find any similarity between the issues which you put before us and a maritime arbitration. Can that knowledge convince me that this is a maritime arbitration?

MB. CHERRY: By the cases, they are maritime arbitrations because it involves charter parties for

shipping. That, by definition, makes it a maritime arbitration. Now, there are a wide variety of claims that come up in an international maritime arbitration, including anti-competition claims.

And our client and others I know have arbitrated big, complicated claims in the tens of millions of dollars and it doesn't change the fact that it is international maritime arbitration. And it is arbitrated according to the customs, and practices, and procedures of international arbitration that they all expect when they contract it.

And arbitrators — you can choose arbitrators that are lawyers. Certainly under the ASBATANKVOY you're not required to choose someone who is not a lawyer — under the Stolt or the Kohap agreement and the KP and the Vege Oil agreement, it requires you to choose someone in the agreement in the shipping industry, but you expect a certain procedure for people that are familiar with these proceedings.

We're going to — we do have two people here who do this for a living, arbitrating —

CHAIRMAN AKSEN: I'm asking the question I'm asking because I'm not sure that their testimony is relevant.

MR. CHERRY: As Mr. Harris will testify, he arbitrated disputes worth hundreds of millions of dollars for over a year. These are big complicated cases with international law, they are fully capable of dealing with these types of disputes. But —

ARBITRATOR JENTES: But isn't the issue, as you yourself stated, what did the parties intend in the context and what is either of the experts going to add to that?

MR. CHERRY: I think what they will add is that they have spent a year interpreting the agreements and having the parties negotiate them, sitting across the table from them talking about the agreements and the terms that they negotiate.

And in that world, in that context, people understand you can't consolidate disputes, you have to focus on disputes arising under this charter agreement. That's the arbitration in front of them then and there, it is these parties and the claims involving that charter agreement.

And if you have other disputes involving another charter agreement, you can't do it, not unless everyone agrees up front. That's the context that they deal with and the types of arbitrations all of these claimants and these respondents have all the time. And that's what we contemplated when we negotiated these contracts that are at issue now and they can say that, that's what they deal with.

ARBITRATOR FEINBERG: Why didn't you put into these contracts boilerplate language, you shall not consolidate, you shall not have a class?

MR. CHERRY: Well, as the Willison contract —

ARBITRATOR FEINBERG: Willison? He's been dead five years.

ARBITRATOR JENTES: You knew him, though.

ARBITRATOR FEINBERG: I'm just curious, if it is an appealing option, why didn't very sophisticated big companies that aren't mom-and-pops put in the language as to what they weren't willing to agree to?

MR. CHERRY: Because you don't put into the contract the things that the law provides anyway,

that's what Willison said. You have to know what the law said at the time you enter this agreement because you're not going write down everything the law gives you anyway. You make exceptions to what the law provides if you want to renegotiate the contract and that's what the parties do here.

And in this context throughout this time period, they knew you couldn't consolidate. So the SMA rules provided more consolidation. As a rule, if you want consolidation, you incorporate the SMA rules.

We have some contracts, not at issue here, that incorporate the SMA rule. That provision, if you want consolidation, you know how to do it. And you understand that if you don't do that, you can't have it. So that's why you have to know what the law is at the time. At the time we negotiated these contracts, the law couldn't have been clearer that you can't do this, you can't consolidate unless you expressly provide for it.

ARBITRATOR JENTES: Let me go back to your context argument and I don't want to get into the other motions. But does it make any difference in your judgment as to how we read the contract? If for example you had a U.S. chemical company that enters into one of these agreements and designated New York and the application of the law there enforced, i.e. U.S. law, does that kind of person more likely contemplate that class actions night well be in the cards even though unstated, as opposed to somebody who is in Singapore involved in a charter party on a shipment to Tokyo, where the designation is London and the law there enforced. Do we potentially have to read the contracts differently depending on who is involved?

MR. CHERRY: In this case, we have for instance with the contracts with KP Chemical, we have parties sitting in Norway and London and Korea, and they are using a standard form that they negotiated to help guide their negotiations. And it says under the United State Arbitration Act, they know there is general federal law out there that lies with arbitrations. They don't know South Carolina law from California law, they know general federal law and that federal law bars consolidation of class actions unless you expressly put it into your contract. That's what the law said at the time they drafted the contracts.

That's the same if you're in Singapore or you're in London or you're in New York. In a federal maritime arbitration — an international maritime arbitration, they choose a location, but they don't expect that if they come to New York that all of a sudden they are sucked into a U.S. style class action litigation that's not — that was not in the economic calculus when they negotiated these contracts. And these are international proceedings regardless of whether they are in New York or London or — does that —

ARBITRATOR JENTES: Not quite. If you go back to my hypothetical, which is a U.S. — okay, maybe there aren't any, I assume there are, that arrange for a charter party and it designates New York and New York law. Isn't it more likely or is it less likely or do we ignore that in terms of interpreting the contract?

MR. CHERRY: Well, first of all, the contracts here, none of them say apply New York substantive law, they just say U.S. law.

ARBITRATOR JENTES: Well, isn't it New York or the law there enforced?

MR. CHERRY: They say U.S. law, on the contracts on the tank law, JLM, which is in your —

ARBITRATOR JENTES: Packet.

MR. CHERRY: Yes, first of all, KP's agreements and Animalfeeds doesn't say New York anywhere.

ARBITRATOR JENTES: No, no, take the one that's the New York one, strike the —

MR. CHERRY: JLM next to their strike on the second page of their agreement and it looks like this.

ARBITRATOR JENTES: Hang on, let me get it.

MR. CHERRY: On the second page next to arbitration, it says, New York, U.S. law, so they've expressly provided U.S. law for their arbitration.

MR. PERSKY: As a general term?

MR. CHERRY: Yes, I'm getting there.

MR. PERSKY: Thank you.

MR. CHERRY: Under paragraph 24 they have tank law, they provided a specific term and you can argue that comes from the general term. But in the general term, it says, "shall be put to arbitration in the City of New York or the City of London pursuant to the laws related to arbitration there enforced."

Now, as we've shown in our briefing, the laws that relate to arbitration from international maritime arbitrations in New York is federal law, it is a maritime transaction for federal law. We've provided other — a treatise on maritime disputes that said —

ARBITRATOR JENTES: Does that include Rule 23 federal law?

MR. CHERRY: No, those are procedures used in federal courts, just like federal statutes.

You're not in court, so you don't interpret as — the cases say when you arbitrate, you give up the procedures used in court, you give up the niceties and procedures.

ARBITRATOR JENTES: Pursuant to the laws —

MR. CHERRY: Relating to arbitration, relating to arbitration.

ARBITRATOR JENTES: Okay.

ARBITRATOR FEINBERG: Let me ask a quick question. If a Norwegian shipment to Singapore references New York or U.S. laws, is — are those shippers consenting to U.S. jurisdiction over that shipment between Norway and Singapore?

MR. CHERRY: U.S. jurisdiction?

ARBITRATOR FEINBERG: Yeah.

MR. CHERRY: I don't think so.

ARBITRATOR FEINBERG: I'm anticipating another motion.

MR. CHERRY: We'll deal with that. But one thing, first of all, under New York law, U.S. law doesn't provide for consolidation. I mean, if we submitted the New York arbitration statute, I mean, I don't think there's — if you're talking about the intent of the parties, but I don't think there's really a difference in the law in New York versus federal law that applied in the Second Circuit at the time these parties entered into these agreements.

ARBITRATOR JENTES: You're doing it on the basis that there's consolidation versus Rule 23?

MR. CHERRY: Yes, there was nothing at the time, and I don't think anything today, that incorporates Rule 23 of the federal rules of civil procedure.

MR. KOLASKY: Any arbitration procedure, unless the parties provide for that in their agreements. That's generally the sort of thing you arbitrate to avoid the type of proceeding you're agreeing to.

But your question — I think I'd rather have Bill —

ARBITRATOR FEINBERG: That's fine. It was triggered by the language you read.

CHAIRMAN AKSEN: Anything else, Mr. Cherry, or have we exhausted you?

MR. CHERRY: Yes, we would like to — I think we've already addressed it, but as to the public policy unconscionability argument, the Second Circuit rejected the same arguments. But we would like to present two witnesses, we don't intend to do direct examination, we would like to introduce their reports that —

CHAIRMAN AKSEN: We will permit them if any of my colleagues have any questions.

Do you have any questions?

ARBITRATOR JENTES: Oh. The only question I had was sort of the same thing that I —

MR. VASQUEZ: I think the question you're asking him you may wish to ask —

ARBITRATOR FEINBERG: Where is home for you guys?

MR. HARRIS: London.

CHAIRMAN AKSEN: And you're here in the role of an expert?

MR. HARRIS: That's correct.

Whereupon,

JOHN KIMBALL,

was called as a witness by counsel for Respondent Stolt-Nielsen, and having been duly sworn by the Notary Public, was examined and testified as follows:

Whereupon,

BRUCE HARRIS,

was called as a witness by counsel for Respondent Stolt-Nielsen, and having been duly sworn by the Notary Public, was examined and testified as follows:

ARBITRATOR JENTES: My question to both of you and address it separately obviously is, having listened to all this debate, what do you have to add that might help us decide this question as to whether or not arbitration contracts contemplate a class action proceeding in the United States?

MR. KIMBALL: Well, if I can go first, I agree with all the comments about the question of intent. And of course, I work in the United States. In these maritime arbitration cases, to answer your question, I think this is a maritime arbitration. Maritime arbitrators do deal with cases of this type on a regular basis.

CHAIRMAN AKSEN: Antitrust claims?

MR. KIMBALL: Well, they deal with claims arising out of charter parties and that could be the whole —

CHAIRMAN AKSEN: Have you ever, as a maritime arbitrator, ever decided a class action with antitrust issues?

MR. KIMBALL: I personally have not.

CHAIRMAN AKSEN: And you, sir?

MR. HARRIS: I have been involved in cases involving antitrust issues, but it was not part of an arbitration. Antitrust had no effect in the decision.

CHAIRMAN AKSEN: Do you handle arbitrations in London under New York law?

MR. HARRIS: I have had —

CHAIRMAN AKSEN: Have you handled arbitrations in New York under London law?

MR. KIMBALL: We do sometimes and we will call in an English lawyer.

CHAIRMAN AKSEN: As an American arbitrator deciding British law?

MR. KIMBALL: Yes.

CHAIRMAN AKSEN: In a maritime arbitration in New York?

MR. KIMBALL: Yes, that can be done, and the reverse is true. I have testified as an expert on New York law in a London arbitration where the English arbitrators decided New York Law.

CHAIRMAN AKSEN: Very good. I see you're a member of the London Corps of International Arbitration.

MR. HARRIS: I'm the director.

CHAIRMAN AKSEN: Director, that's even more impressive.

Does the London Corps of International Arbitration have a view?

MR. HARRIS: Not that I'm aware of, I suspect it is inconceivable.

ARBITRATOR JENTES: I'm sorry?

MR. HARRIS: It is inconceivable.

CHAIRMAN AKSEN: Inconceivable.

Do you belong to any of these maritime associations?

MR. KIMBALL: No, I'm actually a lawyer, I practice law in New York.

CHAIRMAN AKSEN: For which firm?

MR. KIMBALL: Healy & Ballie.

CHAIRMAN AKSEN: A very distinguished maritime firm.

MR. KIMBALL: Thank you, I've been with Healy & Ballie for two years and I also teach law at New York University.

CHAIRMAN AKSEN: I used to teach international arbitration.

ARBITRATOR JENTES: Go back and let them pick up on my question.

MR. KIMBALL: Just back to the intent point, the point I want to make listening to this discussion, I was trying imagine myself in a conference room in Singapore in Tokyo or Oslo or Greece with shipping executives that I represent or charters that we represent, and trying to imagine their reaction to the discussion about this issue.

And I can tell you I think with a high degree of confidence that they would be pretty horrified to even hear a discussion about a possible class action in a maritime arbitration. And I think it would probably have a very negative impact on the arbitration.

I don't think they would even understand the idea that this is a possibility by having agreed to New York arbitration could somehow be brought into a class action proceeding, it is something that would be quite foreign to them.

ARBITRATOR FEINBERG: No lawyer would explain to them under the Sherman Act that class actions in the United States are common and that if they don't want class actions to be conceivable they should write it into the contracts?

MR. KIMBALL: Well, you say if they don't want it to be, they should write it into the contract. Most people I work with when they write a contract they say what they intend the parties to agree to. And they don't have the idea that if we haven't expressly excluded something, we're therefore subject to it.

So it — it wouldn't be the way they look at it. It is not the reality, there are issues that are a matter of maritime law. Look at what was the intent of the parties and if they haven't said they intended to exclude something, that doesn't mean they have agreed to it.

MR. HARRIS: My experience with the practice of negotiating of contracts is the parties do not make reference to that which is not necessarily referred to by law or by custom and practice. If something is not involved, they don't put it in.

CHAIRMAN AKSEN: Do they have treble damages?

MR. HARRIS: No. I can agree with Mr. Kimball in relation to maritime arbitration, having anything to do with shipping contracts essentially. And I make reference, I made reference a moment ago to an instance when I had an antitrust case in London under Euro-

pean law that was under an arbitration clause in a container consortium. That would be regarded as a maritime arbitration. If you wanted a definition in English you could look back to the 1979 Arbitration Act where there was a special exclusion and an appeals procedure.

CHAIRMAN AKSEN: If this issue came up in London, does London or British law defer to European Union law?

MR. HARRIS: I think it would have to.

CHAIRMAN AKSEN: Have to?

MR. HARRIS: There's substantial law, not necessarily procedural law, that would probably be quite different.

Just to add also, I have said in my declaration that I think any charter who suggested that this could be a class action would say impossible. In fact, I did manage to speak this morning to a former oil trader with 25 year's experience who worked with major —

MR. PERSKY: I object to this.

MR. HARRIS: I simply asked him what was your reaction, he said it would be hard.

CHAIRMAN AKSEN: Why would an expert have to consult with somebody else?

MR. HARRIS: I just wanted to check on my view.

CHAIRMAN AKSEN: Any other questions?

ARBITRATOR JENTES: With that said, are there views that you have or anything that you want to add?

MR. HARRIS: Just one thing. It also occurred to me the other night, since I've come across the Atlantic

I have quite sleepless nights, and that one might see a reverse situation where HR — the product loaded to a particular product that contained what was damaged, that charter would resist anything like a consolidation or any attempt to consolidate an arbitration or have a class arbitration. He would want individual arbitrations from each of the shippers to show damages.

CHAIRMAN AKSEN: Well, we thank you, sir, very much for traveling over.

ARBITRATOR JENTES: Any questions?

MR. PERSKY: Yes, I have a few, not cross-examination for the witnesses, I just have a few short points, short, I promise I will be short.

CHAIRMAN AKSEN: Thank you both for coming in. I just want you to know that the chairman has great respect for both your law firms, I know some sitting federal judges from your law firms and I was a vice president some years ago and I have great respect.

MR. HARRIS: I think we did shake hands some years ago.

CHAIRMAN AKSEN: That probably should have been disclosed, but again thank you both very much.

(Whereupon the witnesses were excused.)

CHAIRMAN AKSEN: If you feel compelled, Mr. Persky, would you care to make a few short comments?

MR. PERSKY: I will try to be as brief as I can. With respect to consolidation, it is undisputed that the federal cases are split, whether you can order consolidation of arbitration.

Number 2, the Vito case that we cited in the New York Court of Appeals decided with approval an admi-

ralty law which recommends a consolidation of arbitrations.

Number 3, state law being incorporated, the state law governing arbitration which is incorporated in an arbitration clause is perfectly permissible and happens all the time. And if that's what the ASBATANKVOY clause did, it did and it incorporated the Vito case. With respect to the federal law governing arbitration, that includes Basel.

As to this notion that this is a maritime dispute involving charter parties, Mr. Cherry talks about a charter party dispute, really. This is an international conspiracy to allocate customers in markets, it is a cartel that has very little to do with charter parties and maritime law.

What does that mean? Mr. Cherry says he misstated it. It clearly means that a class arbitration does not violate the Federal Arbitration Act and that the issue is to be decided by the arbitrators. As to the custom and practice they are talking about is really all pre-Basel and we don't think it is particularly relevant now.

As to the class construction awards that we cite, Mr. Jentes asked if they were all consumer cases, at least one of them was an antitrust case involving a business and —

ARBITRATOR JENTES: Which one was that?

MR. PERSKY: Cable Connection versus DirecTV cited at pages 1 and 4 of our reply.

Three, the other business case is non-consumer cases, Bagpeddler.com versus U.S. Bank Corp. and Nova Info Systems cited at pages 1 and 8 of our reply. Hearthside Restaurant Incorporated versus Qwest Dex, Inc., cited on page 1 of our reply. Warrior Trans-

portation versus Fee Transportation Services, Inc., cited, at page 1 of our reply.

Virtually none of the arbitration cases or what cases we cited relied on this notion of contract of adhesions, they relied on a notion of a broad clause that does not expressly forbid class arbitration, that's permitting class arbitrations to move forward.

CHAIRMAN AKSEN: That wasn't being covered by the experts?

MR. PERSKY: Excuse me?

CHAIRMAN AKSEN: Your testimony now is to comment on the experts.

MR. PERSKY: I was actually replying to Mr. Cherry as well. These are my notes to his answer to my argument. I should have as a moving party the right to briefly respond or at least attempting to do so.

Once again, I consider this to be a run-of-the-mill maritime arbitration really is not the way to go here.

MR. CHERRY: Two quick points. First of all, he said the federal courts are split, I assume they are referring to the First Circuit allowing the consolidation in a case where there was a statutory right under state law as to a class action to consolidation. All the other circuits say you can't do it and in fact they don't read the First Circuit as being inconsistent, they say it's a unique situation, so that's not at issue here.

They say Basel, they say — this all goes to custom and practices prior to Basel, so the fact is the contrast here are all prior to Basel. You have to look at the intent of the parties at the time they entered into it, so of course it is relevant.

Mr. Persky said earlier, you asked him about what would people anticipate who are in these other countries at the time they entered into these contracts. You said, well, pre-Basel at the time — if you're talking about the intent of the parties, they wouldn't have thought you could do it because it is pre-Basel, that's exactly right. You have to look at the intent of the parties at the time. And certainly we show the intent of the parties was not to allow a class action arbitration.

The cases are all consuming cases. You mentioned Cable Connection that's a distributor case, they record the arbitration, that is a contract of adhesions, look to California cases prior to Basel and see what the intent of the parties would have been.

He mentioned Warrior Transportation, he said not a consumer case, it is truck drivers, it is truck drivers, it is basically an employment case. It is the way they set up the trucking company. There Basel did not change the law and then you look to the interpretation of the agreements. As we said, the cases here are all clearly distinguishable, they are consumer cases, virtually every single one of them starts with a premise that it is a contract of adhesions.

CHAIRMAN AKSEN: I'd like to move on to issue number 2, because we've spent an hour and 20 minutes on clause construction, which the panel is obviously most interested in.

* * *

[CAJA A643-A650]

In the Matter of the Ad Hoc Arbitration Between	)
	)
ANIMALFEEDS INTERNATIONAL CORP., JLM EUROPE B.V., JLM INTERNATIONAL, INC., and KP CHEMICAL CORP., individually and on behalf of all others similarly situated,	)
	)
Claimants,	)
	)
and	)
	)
STOLT-NIELSEN SA, STOLT-NIELSEN TRANSPORTATION GROUP LTD., ODFJELL ASA, ODFJELL SEACHEM AS, ODFJELL USA, INC., JO TANKERS BV, JO TANKERS USA, INC., and TOKYO MARINE CO. LTD.,	)
	)
Respondents.	)

EXPERT DECLARATION OF JOHN KIMBALL

I. Professional Background

1. For the past 30 years, I have been a practicing maritime lawyer in the United States. I am currently the Chairman of Healy & Baillie, LLP in New York. Healy & Baillie is ranked by Chambers USA in the top tier of maritime law firms in New York, a distinction shared by only two other firms. I have been ranked by the same publication as the leading maritime litigation lawyer in New York.

2. I have represented countless parties in a wide variety of maritime disputes, including numerous charter party, bill of lading, and other contract disputes, as well as major casualties, such as collisions, strandings, and sinkings. These disputes are overwhelmingly international, and involve parties from different countries and transactions involving foreign commerce. I have developed a particular expertise in disputes involving charter parties, and I regularly represent both owners and charterers in these disputes. The vast majority of charter party disputes are resolved by arbitration, in accordance with an arbitration clause in the relevant charter party. I have been involved in a number of disputes concerning interpretation of these arbitration clauses and questions related to the jurisdiction of the arbitral tribunal under these clauses.

3. I have also been appointed several times as an arbitrator in maritime disputes, and have issued awards both as a sole arbitrator and as part of an arbitral tribunal. In my role as an arbitrator in one case, I was called on to decide questions related to the panel's jurisdiction and to interpretation of the parties' arbitration clause.

4. I have written extensively on maritime law, and in particular on charter parties. I am the co-author of the treatise Voyage Charters, which is in its second edition, and co-author of the treatise Time Charters, which is in its fifth edition.

5. I am an adjunct professor of law at the New York University School of Law, where I teach admiralty law, and I speak regularly at professional gatherings on issues related to maritime law. I was also appointed as the John W. Sims Distinguished Admiralty Practitioner in Residence at Tulane University Law School in 2003.

6. I am a Titulary Member of the Comite Maritime International, a member of the Maritime Law Association of the United States (and was on the Executive Committee of that association for a number of years), and a Fellow of the American Bar Foundation.

7. My c.v., which is attached, provides further details about my professional background and experience.

II. Arbitration in Maritime Transactions

8. There are a number of important reasons that parties choose arbitration as the mechanism for resolving their maritime disputes. Most fundamentally, parties choose arbitration precisely to avoid having their disputes resolved by a court, but rather by individuals knowledgeable about the issues in dispute, in a flexible, economic, and expeditious manner. By choosing arbitration, parties contractually agree that their disputes will be arbitrated by a panel constituted in a manner of their choosing. In this respect, arbitration provides significant advantages that parties take into account when deciding the commercial terms of their contracts.

9. The parties in maritime transactions are often from different countries and their transactions often involve foreign commerce or foreign ports. Choosing arbitration provides the opportunity for a truly neutral and international dispute resolution mechanism that protects the parties from being subject to the specific civil procedure rules of a particular court, which might be unfamiliar to them. In addition, choosing arbitration in a particular jurisdiction provides the parties with certainty about where and how any dispute will be resolved and helps to mitigate the risk of parallel proceedings in multiple national courts and the risk of "home court advantage."

10. Equally significant, choosing arbitration allows the parties to influence the composition of the tribunal that will decide their dispute, which is fundamentally important to the parties in these transactions. Virtually all of the arbitration clauses in the charter parties that are in common use allow the parties each to select one member of the tribunal that will decide the case. The parties are therefore able to select an arbitrator who has the requisite commercial or legal experience to decide the precise dispute at hand. In my experience, the parties I represent regard these appointment rights as an indispensable feature of their arbitration agreements and exercise them with the utmost care and seriousness.

11. Arbitration also offers greater procedural flexibility than litigation, and is intended to result in a faster and less expensive proceeding. These features are particularly important to parties in maritime disputes, where exigent circumstances often require a quick resolution of a dispute, and where the amounts in dispute may not necessarily justify lengthy and complex dispute resolution procedures.

III. Asbatankvoy and Vegoilvoy Arbitration Clauses

12. I have reviewed the Claimants' Consolidated Demand for Class Arbitration and the Claimants' Motion for Clause Construction Award Permitting Class Arbitration in the above-captioned matter. I understand that the relevant contracts between the Claimants and the Respondents are based on the standard Asbatankvoy or Vegoilvoy charter party forms, and that the arbitration clauses in these contracts also follow the standard Asbatankvoy and Vegoilvoy arbitration clauses. For ease of reference, I have attached the standard

Asbatankvoy and Vegoilvoy charter party forms as appendices to this declaration.

13. I have been asked to provide my opinion as to whether the standard Asbatankvoy or Vegoilvoy arbitration clauses support a construction permitting class action arbitration. I confine my opinion to these clauses and have not considered any other agreements among the parties. Based on my experience in the maritime industry, I can say with the highest degree of confidence that these arbitration clauses were not intended to support such a construction.

14. First, the Asbatankvoy and Vegoilvoy arbitration clauses on their face do not authorize class action arbitrations, or provide any indication that the parties intended or even considered that their disputes could be submitted to class action arbitration. If the plain terms of the parties' contract do not authorize class action arbitration, the arbitrators should decline to exercise such jurisdiction. It is indisputable that maritime charter parties, and particularly the arbitration clauses in them, must be interpreted according to their plain terms. As written in the American law section of Michael Wilford, Terence Coghlin, John D. Kimball, Time Charters (5th Ed. 2003), at 59:

> Under ordinary contract principles as applied in the general maritime law, charter language is to be interpreted to give full effect to the plain meaning of the words used. The charter should be read as a whole. Unambiguous provisions of the charter should be given their plain meaning and a court may not look beyond the words chosen by the parties to determine their intent. * * *

15. Second, the history of the Asbatankvoy and Vegoilvoy charter party forms leaves no doubt that they were not intended to allow class action arbitration. The Asbatankvoy charter party came into common use in the 1970s, and was derived from the Exxonvoy charter party, which it replaced. At the time the Exxonvoy arbitration clause was drafted (and at the time it was adopted in the Asbatankvoy charter party), class action litigation in the United States was in its infancy, and no one in any industry had even begun to contemplate the possibility of class action arbitration. Moreover, the Asbatankvoy and Vegoilvoy charter parties were intended to be used in international transactions, by parties who were very commonly from countries other than the United States. The charter party agreements themselves, and particularly their arbitration clauses, were meant to provide terms that would be acceptable to parties from virtually every nationality. There is no doubt whatsoever that these forms would not have been acceptable to the vast majority of owners and charterers if these forms had authorized the use of particular national court litigation procedures, such as class actions, for the resolution of disputes under the charter parties.

16. Shipowners and charterers from many foreign countries agree to New York arbitration, with no thought that by doing so they could be subjecting themselves to a class action. Non-U.S. parties typically have no experience with class actions and would be horrified to learn they could find themselves caught up in a class action case by agreeing to arbitrate in New York, as compared with other leading maritime arbitration centers whose legal systems do not recognize these types of cases (e.g., London or Singapore). Foreign shipowners and charterers would veto New York

arbitration clauses outright if they believed such clauses could embroil them in class actions. It is hard to imagine that major oil company charterers, for example, would knowingly or willingly subject themselves to class actions by agreeing to New York arbitration.

17. Third, the common usage of the Asbatankvoy and Vegoilvoy charter parties confirms that the parties would have no expectation that these clauses would authorize class action arbitrations. These charter parties are used by owners and charterers for the shipment of particular goods under particular terms of carriage. Although the parties' contracts are based on the standard charter party forms, the parties' specific contractual terms are unique. There is absolutely no basis for concluding that the drafters and users of these standard charter party forms would have intended to authorize a complex, uniquely American procedural device that would be entirely unsuited to the types of disputes that commonly arise under these forms.

18. Fourth, allowing the use of class action arbitration would eviscerate many of the advantages of the arbitral process, and therefore cannot have been intended by the parties to these clauses. In a class action arbitration, many of the parties who would be bound by the final award would not have had the opportunity to influence the composition of the arbitral tribunal, which is one of the fundamental reasons that parties choose to enter arbitration agreements. It surely cannot be right that unrelated third parties can be bound by the decision made by an arbitration tribunal that they did not participate in constituting, in proceedings in which they did not participate.

19. It is settled law that because arbitration is a matter of agreement, neither a court nor an arbitration panel

may consolidate arbitrations under different contracts without the consent of all the parties to all the contracts. A party to a particular contract and arbitration agreement cannot be compelled to participate in an arbitration with a party to a different contract and arbitration agreement to which the former is not party. Further, a party to a particular contract cannot be made to participate in the same arbitration proceeding with two different parties to two different contracts to which that party was privy.

20. The Rules of the Society of Maritime Arbitrators, Inc. ("SMA") may be applied to arbitrations if the parties so agree. SMA Rule 2, which permits consolidation, was put in the rules in recognition of the Second Circuit's ruling that consolidation is available only by agreement of all the parties. In my experience, some parties do not agree to use the SMA Rules because of the provision for consolidation.

21. In the 30 years I have been practicing as a maritime lawyer, I have never encountered an arbitration clause in a charter party that could be construed as allowing class action arbitration. In fact, before learning of this matter, I had never even heard the suggestion that a maritime arbitration could proceed as a class action. I was, quite frankly, taken aback by the suggestion that these charter parties authorize class action arbitration, a notion which strikes me as completely commercially unrealistic. Allowing class action arbitration under one of these charter parties would be more than unprecedented. It would be entirely inconsistent with the expectations of the thousands of parties who have chosen New York as the situs for international maritime arbitrations, and could well lead them to choose a different arbitral situs in the future.

I declare under penalty of perjury that the foregoing declaration and the following attachments are true and correct.

/s/ John Kimball
John Kimball

October 18, 2005
New York City, New York

[Attachments omitted]

[CAJA A850-A860]

In the Matter of the Ad Hoc Arbitration Between
ANIMALFEEDS INTERNATIONAL CORP., JLM EUROPE B.V., JLM INTERNATIONAL, INC., and KP CHEMICAL CORP., individually and on behalf of all others similarly situated,
Claimants,
and
STOLT-NIELSEN SA, STOLT-NIELSEN TRANSPORTATION GROUP LTD., ODFJELL ASA, ODFJELL SEACHEM AS, ODFJELL USA, INC., JO TANKERS BV, JO TANKERS USA, INC., and TOKYO MARINE CO. LTD.,
Respondents.

EXPERT DECLARATION OF BRUCE HARRIS

I, Bruce Harris, state as follows:

Professional Background

1. My CV (which is attached) sets out in summary form my career in maritime arbitration. As it shows I have been a full-time maritime arbitrator in London for 25 years. Prior to that, my earlier career also brought me into constant contact with maritime arbitration and arbitrators.

2. Over the years I have been involved in a very large number of maritime arbitrations. I would esti-

mate that I have been appointed as an arbitrator in over 8,000 maritime arbitrations (a figure which I am reasonably confident is greater than that for any of my London-based colleagues), and have made awards in a large number of those cases. I have, on a number of occasions, been called on to decide or to take a view upon questions relating to my jurisdiction as an arbitrator and to the interpretation of the arbitration clauses under which the disputes have been submitted to arbitration.

3. I have also been involved in a number of arbitration institutions and associations. I have been involved with the London Maritime Arbitrators Association ("LMAA") in various capacities, including Honorary Secretary, Committee Member and President, for 27 years. I am one of approximately 40 full members of the LMAA, who between them conduct by far the vast majority of maritime arbitrations in the world. In addition, I was deeply involved with the Chartered Institute of Arbitrators, which trains and qualifies individuals to act as arbitrators and which now has over 10,000 members around the world, for about 20 years, including many years as a Council member and one year as Chairman. I am also a Director of the London Court of International Arbitration, and a member of the English Commercial Court Committee. My involvement in these organizations has given me a great deal of exposure to other arbitrators and areas of arbitral activity.

4. As my CV shows, I have also taught and lectured on arbitration and have written or contributed to a number of publications on the topic.

Origins and Objectives of International Maritime Arbitration

5. International maritime arbitration has been established for a very long time, and London has long been the traditional hub for the resolution of international maritime disputes. History has it that maritime arbitration's origins lie in the predominance of the Baltic Exchange as a broking center for the conclusion of charterparties and other maritime contracts. It is said that commonly, when parties had differences, if their brokers could not resolve them by agreement they would refer them to a senior but independent colleague whose views they would regard as final between themselves, and which they would press upon their principals (I imagine that in some cases the principals agreed in advance to be bound). Eventually, it is said, this process metamorphosed into more formal arbitration.

6. In my experience, there are a number of reasons that parties to maritime contracts have preferred to resolve their disputes through arbitration as opposed to litigation. By contracting in advance to arbitrate in a particular situs, parties to maritime contracts, particularly international shipping contracts, assure themselves of a mutually acceptable forum which I believe they perceive as neutral, even if it based in the home country of one of the parties, as sometimes happens. This certainty is particularly important in shipping given the number of jurisdictions through which the vessels travel. The parties also guarantee that they will have a voice in the selection of their decision makers (usually each is entitled to appoint an arbitrator of its choosing), and therefore that those decision-makers will have what the parties judge to be the requisite experience and qualifications to decide the dispute.

7. By choosing arbitration, the parties also avoid the risk of being forced to litigate their disputes in either party's – or indeed any other - national courts. In

addition to providing neutrality, this avoids the risk that the parties' disputes will be subjected to a particular national court's procedural rules (e.g., extensive discovery procedures), with which the parties may not be familiar and/or which they may perceive as being entirely unsuitable for resolving their dispute. By agreeing to have their disputes resolved in international maritime arbitration, the parties ensure that they can have their disputes decided by individuals with significant expertise in the maritime industry, using procedures that are widely accepted and carefully tailored to the needs of the parties, and often to those of the individual case.

8. Parties also choose to arbitrate their maritime disputes because arbitration is a private and confidential process. Arbitration allows the parties to a specific dispute to have that dispute considered and resolved behind closed doors, entirety between themselves, without the risk of the terms of their commercial relationship being disclosed to third parties. Finally, arbitration often leads to a faster decision at a lower cost.

Arbitration Clauses in Charterparty Contracts

9. The great majority of the cases in which I and my colleagues act as arbitrator arise under standard form charterparties. There are a number of standard charters in common use, including the Asbatankvoy and Vegoilvoy forms. I have been appointed as an arbitrator in many disputes arising under these charterparties. Although I do not keep precise statistics, I would estimate that between the late 1970s and early 1990s, perhaps as many as 40% of all the cases I dealt with arose under the Asbatankvoy form, or the identical Exxonvoy form which preceded it. Overall I would say that in my career probably 10% (or even perhaps more)

of my cases have concerned one of these forms or the Vegoilvoy form, which has become increasingly common as the trade in other oils and chemicals has increased.

10. With regard to interpretation, a maritime charterparty is simply a form of contract and in my opinion is to be construed as such according to its plain terms. Only if the charterparty is ambiguous would a London arbitration panel (or, indeed, an English court) look beyond the four corners of the contract.

The Asbatankvoy Arbitration Clause

11. In my experience, the standard Asbatankvoy arbitration clause provides:

> Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York or in the City of London whichever place is specified in Part I of this charter pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen. The decision of any two of the three on any point or points shall be final. Either party hereto may call for such arbitration by service upon any officer of the other, wherever he may be found, of a written notice specifying the name and address of the arbitrator chosen by the first moving party and a brief description of the disputes or differences which such party desires to put to arbitration. If the other party shall not, by notice served upon an officer of the first moving party within twenty days of the service of such first notice, appoint its arbitra-

tor to arbitrate the dispute or differences specified, then the first moving party shall have the right without further notice to appoint a second arbitrator, who shall be a disinterested person with precisely the same force and effect as if said second arbitrator has been appointed by the other party. In the event that the two arbitrators fail to appoint a third arbitrator within twenty days of the appointment of the second arbitrator, either arbitrator may apply to a Judge of any court of maritime jurisdiction in the city above-mentioned for the appointment of a third arbitrator, and the appointment of such arbitrator by such Judge on such application shall have precisely the same force and effect as if such arbitrator had been appointed by the two arbitrators. Until such time as the arbitrators finally close the hearings either party shall have the right by written notice served on the arbitrators and on an officer of the other party to specify further disputes or differences under this Charter for hearing and determination. Awards made in pursuance to this clause may include costs, including a reasonable allowance for attorney's fees, and judgement may be entered upon any award made hereunder in any Court having jurisdiction in the premises.

12. My understanding is that the Asbatankvoy form charterparty was introduced in 1977 as a replica of the contemporaneously discontinued Exxonvoy 1969 form. Under the Asbatankvoy arbitration clause, the parties decide at the time of contracting whether disputes will be settled by an arbitration in either New York City or London. The Asbatankvoy arbitration

clause then lays out the rules for initiating the arbitration. The standard clause then provides: "Until such time as the arbitrators finally close the hearings either party shall have the right by written notice served on the arbitrators and on an officer of the other party to specify further disputes or differences under this Charter for hearing and determination." This provision expressly allows new disputes arising under the same charterparty to be added to the original arbitration, allowing for efficient resolution of all claims arising from a given charterparty. In contrast, the express wording of the Asbatankvoy clause does not permit the parties, absent subsequent agreement, to consolidate disputes under different charterparties or with different parties. That is, the Asbatankvoy on its own does not provide at all for any consolidation of arbitrations.

13. The Asbatankvoy's arbitration language, "all differences and disputes of whatsoever nature arising out of this Charter", is broad in terms of what types of claims may be referred to arbitration; it expressly provides, however, that arbitration under the charter is limited to disputes that arise "out of this Charter". In my opinion that reflects the parties' desire not to have disputes arising out of other contracts included in their arbitration. The parties' choice of words to the effect that arbitration under each charterparty include only the disputes arising under that particular charterparty precludes adding to the parties' arbitration disputes arising under other contracts. This is true even where the contracts are between the same two parties; it is obvious to me therefore that arbitrators acting under one of these clauses do not have jurisdiction to hear disputes arising under different contracts involving unrelated parties.

14. As to the types of claims that are subject to arbitration under the Asbatankvoy or, indeed, any similar clause, in my experience all manner of claims have been arbitrated under charterparties beyond those claims one might consider as "traditional" maritime disputes (e.g., demurrage). I have sat as an arbitrator in maritime arbitrations involving all types of claims, including, for example, intellectual property, torts, and anti-competition claims involving price fixing and/or market allocation. In my experience, all claims arising under a charterparty are resolved by traditional maritime arbitration procedures, regardless of whether the claims themselves can be classified as traditional maritime claims.

The Vegoilvoy Arbitration Clause

15. In my experience, the standard Vegoilvoy arbitration clause reads as follows:

> Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act, and a judgment of the Court shall be entered upon any award made by said arbitrator. Nothing in this clause shall be deemed to waive Owner's right to lien on the cargo for freight, dead freight or demurrage.

16. The Vegoilvoy arbitration clause has several obvious differences from the Asbatankvoy's, including, for example, the requirement that each party nominate a commercial person as its arbitrator and that the chair, if one is required, be an admiralty lawyer. In specifying New York as the arbitral forum, the Vegoilvoy clause also does not provide the choice of forum provided in the Asbatankvoy (i.e. New York or London) but it is not unknown for parties to modify the Vegoilvoy clause to provide for a different forum, London, for example, as was the case in the matters in which I was appointed an arbitrator pursuant to the Vegoilvoy clause. Beyond these particulars, the Vegoilvoy arbitration clause is similar to the Asbatankvoy's in that it broadly includes all types of disputes arising under the charterparty, but confines the arbitrators' jurisdiction to disputes arising under "this Charter Party", and does not provide for consolidation of arbitrations arising under different charterparties.

The Question of International Maritime Arbitrations as Class Actions

17. I have reviewed the Claimants' Consolidated Demand for Class Arbitration in the ad hoc arbitration between Animalfeeds International Corp. et al. as Claimants and Stolt-Nielsen SA et al. as Respondents. I understand that this arbitration is currently convened in New York pursuant to the arbitration clauses in the underlying Asbatankvoy and Vegoilvoy form charterparties and a submission agreement between the parties providing for a consolidated arbitration for limited purposes on certain claims.

18. I have been asked to opine on whether either the standard Asbatankvoy or Vegoilvoy arbitration clause supports a construction permitting a class arbi-

tration. I confine my opinion to these clauses and have not considered the effect, if any, of any subsequent agreements by the parties. I am not a lawyer and I do not intend to suggest that I am any more capable than the arbitral tribunal in this case of interpreting the plain language of the parties' agreements. What I can offer, however, is an opinion informed by my long career and significant experience as an international maritime arbitrator, and more specifically as a maritime arbitrator who has dealt for many years with these very same charterparty agreements.

19. When one looks at the wording of the Asbatankvoy and Vegoilvoy arbitration clauses it seems to me utterly inconceivable that these clauses support a construction enabling a class action by either party. The Asbatankvoy and Vegoilvoy arbitration clauses on their face do not authorize class action arbitrations, or provide any indication that the parties intended or even considered that their disputes could be submitted to class action arbitration.

20. The plain language of the clauses aside, it would seem to me equally inconceivable that there would be any evidence outside the charterparty indicating that the parties intended to permit class action arbitrations. I have no doubt that if disinterested owners and charterers who are parties to arbitration agreements identical to those in this matter were asked the question "Does your arbitration agreement allow third parties to sue or be sued in arbitration as part of a class?" they would reply with a testy "Of course not!" Furthermore, I think that if reasonable charterers and owners were told that arbitration in New York meant exposure to class actions, they would almost always prefer another arbitral situs.

21. The reason parties agree to arbitrate international maritime disputes in the first place is to accomplish neutral, private commercial dispute resolution without the delay, uncertainty, and complexity of court proceedings. These objectives would be wholly undermined if one party could impose on another a U.S. style class action litigation. Such a proceeding would destroy the privacy and confidentiality of the arbitral process, would eliminate the ability of each party involved to influence the selection of the tribunal, and would subject the parties to a complex national court litigation process which is both unfamiliar and unsuited to maritime disputes. In short, allowing class action arbitration would destroy the very benefits of arbitrating.

22. For the same reasons, it is absolutely clear to me that arbitrators do not have the authority or the jurisdiction to consolidate arbitrations even between the same parties without the parties' express consent. If the parties agree, there is no issue, of course, and it is not unknown for parties to agree to consolidate arbitrations without any contract language expressly permitting such consolidation. Absent such agreement by the parties, however, it is unquestionable that an arbitral panel cannot consolidate claims arising under more than one charterparty.

23. On their terms the Asbatankvoy and Vegoilvoy arbitration clauses do not authorize consolidation of arbitrations arising under different charterparties. These clauses plainly require that the arbitration which takes place under the clause include only disputes arising under that particular charterparty. In the cases in which I have seen a request to consolidate claims arising under different charterparties, the request for consolidation has been denied unless all of the parties have specially agreed to it. I myself have rejected requests to

consolidate claims arising under different charterparties, because the arbitration clause under which I obtain my jurisdiction simply does not allow it. If a tribunal does not have jurisdiction to consolidate claims even between the same parties, it seems obvious to me that the tribunal would not have jurisdiction under these clauses to entertain the claims of different parties, each with their own separate contract, in a class action arbitration.

24. I have been working as a maritime arbitrator for thirty years and this matter is the first I have ever encountered where the issue of a class action arbitration has even been raised. Whatever the status of class action arbitrations in other fields in the U.S., there is no precedent of which I am aware for a class action maritime arbitration in the U.S. or elsewhere. If this matter were to proceed as a class action arbitration, I believe it would be unprecedented, certainly in maritime arbitration. None of the arbitrator colleagues – maritime and otherwise – to whom I have spoken have ever heard of the idea. Nor would they be prepared to entertain it any more than I would.

I declare under penalty of perjury that the foregoing and my attached CV are true and correct.

/s/ Bruce Harris
Bruce Harris
Chartered Arbitrator

October 18th, 2005
London, England

[Attachment omitted]

[CAJA A2025-A2026]

In the Matter of the Arbitration Between
ANIMALFEEDS INTERNATIONAL CORP., JLM EUROPE B.V., JLM INTERNATIONAL, INC., and KP CHEMICAL CORP., individually and on behalf of all others similarly situated,
Claimants,
and
STOLT-NIELSEN SA, STOLT-NIELSEN TRANSPORTATION GROUP LTD., ODFJELL ASA, ODFJELL SEACHEM AS, ODFJELL USA, INC., JO TANKERS BV, JO TANKERS USA, INC., and TOKYO MARINE CO. LTD.,
Respondents.

SUPPLEMENTAL EXPERT DECLARATION OF JOHN KIMBALL

1. I am submitting this supplemental declaration to correct my testimony given at the hearing on November 21, 2005.

2. During questioning by the panel chairman, I was asked whether I had ever been involved in a maritime arbitration in which antitrust issues were raised. My answer at that time was "no." I wish to correct my testimony on this point.

3. After returning to my office on November 22, I recalled that in 1986-1987, I was involved in a maritime arbitration in which Sherman Act claims were asserted. The case was Kuwait Maritime Corporation v. General Motors Overseas Distribution Corporation and General Motors Acceptance Corporation. Our client was Kuwait Maritime Corporation and we asserted claims for "dead freight" under a transportation contract for the transport of cars and other motor vehicles. General Motors asserted counterclaims for violations of the antitrust laws related to an alleged price-fixing conspiracy. There is a reported decision in the case by Judge Keenan in which he issued an order compelling arbitration of the deadfreight claims and other issues. The decision is reported at 1986 U.S. Dist. LEXIS 18284. The antitrust claims were asserted as counterclaims at a later stage in the arbitration proceedings. The case was ultimately settled.

I declare under penalty of perjury that the foregoing declaration is true and correct.

/s/ John Kimball
John Kimball

Dated: November 30, 2005
New York City, New York

[CAJA A1242-A1248]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JLM INDUSTRIES, INC., JLM INTERNATIONAL, INC., JLM INDUSTRIES (EUROPE) BV, JLM EUROPE BV and TOLSON HOLLAND, individually and on behalf of all others similarly situated, Plaintiffs, vs. STOLT-NIELSEN S.A., STOLT-NIELSEN TRANSPORTATION GROUP LTD., ODFJELL ASA, ODFJELL USA INC., JO TANKERS B.V., JO TANKERS, INC. and TOKYO MARINE CO. LTD. Defendants.	Civ. 3:03 CV 348 (DJS) May 2, 2003

AFFIDAVIT OF GREGORY P. DOOLEY IN SUPPORT OF MOTION TO COMPEL ARBITRATION

STATE OF CONNECTICUT)
) ss.: Greenwich
COUNTY OF FAIRFIELD)

GREGORY P. DOOLEY, being duly sworn, deposes and says:

1. I am employed by Stolt-Nielsen Transportation Group Inc. as an Assistant Shipbroker. My responsibilities as Assistant Shipbroker include the chartering of Stolt vessels owned and/or operated by Stolt Parcel Tanker Inc. and its successor and affiliate companies, including Stolt-Nielsen Transportation Group Ltd. This includes negotiating and concluding charter party agreements on behalf of Stolt Tankers Inc. I make this affidavit on the basis of my personal knowledge and in support of Stolt-Nielsen's motion to compel arbitration.

2. I am over the age of eighteen and understand the nature and obligations of an oath.

3. In my role as Assistant Ship Broker, I am generally familiar with and involved in the day-to-day negotiations Stolt-Nielsen conducts with its customers regarding chartering of Stolt-Nielsen vessels for the carriage of the customer cargo. In particular, I am familiar with, and have negotiated and signed, contracts Stolt-Nielsen concluded for Stolt Tankers Inc. with certain of the JLM entities that are the named plaintiffs in the above-captioned action. All of the Stolt Tankers Inc. agreements with JLM entities with which I am familiar involved international maritime shipments of cargo.

4. I have read the Affidavit of Marc Van Driessche of April 15, 2003 submitted in opposition to the motion to compel arbitration and, for the reasons stated below, believe that it is factually incorrect regarding JLM's commercial relationship and negotiations with Stolt-Nielsen.

A. Terms Of JLM Charter Party Agreements Are Result Of Negotiations

5. Like many of Stolt-Nielsen's customers, JLM is a sophisticated multi-national corporation with extensive experience in the field. I have negotiated and executed charter party agreements with JLM entities, and I am familiar with other charter parties Stolt-Nielsen has concluded with them. JLM conducts all of its negotiations with Stolt-Nielsen with the assistance of a professional chartering broker, which acts as JLM's agent.

6. I negotiated the charter party agreement dated May 16, 2001 with JLM International, Inc. that is attached to the Winsor Affidavit as Exhibit D ("May 16 Charter Agreement"). For the May 16 Charter Agreement JLM negotiated with me through its chartering broker, International Tanker Chartering, Inc ("ITC"). ITC is a professional chartering broker that specializes in assisting charterers in negotiating with ship owners. ITC touts that it is able to secure more favorable terms for the charterer by virtue of ITC's knowledge of the industry. It is my experience in negotiating with ITC/JLM that they typically propose the terms of the ASBATANKVOY charter party – including the arbitration clause – as the basic form of a charter party agreement and then tailor that with JLM's special provisions.

7. The negotiation of the May 16 Charter Agreement was typical of the negotiations Stolt-Nielsen has with ship charterers. First, the broker alerts various ship owners that it has a cargo a charterer wishes to ship and describes the cargo and dates. If Stolt-Nielsen has a ship available for the cargo and is interested it submits an indication. If the Charterer finds the indication and ship position attractive, the parties then ne-

gotiate the main terms, usually by e-mail and telephone conversations. Inevitably, there is a back and forth between Stolt-Nielsen and the broker regarding the main terms. Once the main terms are agreed, the parties negotiate the lesser terms. These typically include the issue of using arbitration for dispute resolution. Once the main terms and lesser terms are agreed, the Charterer places the fixture on subs for a specific period. Once the subs are lifted, the parties are then said to have a "clean fixture." At that time broker normally provides by e-mail a "recap" of the terms. Upon confirmation of the e-mail, the charterer's broker may then draw up the traditional charter party for signature by Stolt-Nielsen and the charterer. Increasingly, however, the parties simply rely on the "recap" for the terms and do not memorialize it with a formal charter party agreement.

8. Even after the charter party is agreed, terms may be amended by mutual agreement. This was the case with the May 16 Charter Agreement. The last page of that exhibit is an Addendum, dated June 12, 2001, modifying the terms of the May 16 Charter Agreement. The ship was going to arrive late so Stolt-Nielsen requested the laydays to end at a later date. JLM agreed but required in exchange that it have extra laytime.

9. JLM normally seeks to include its special provisions in a charter party agreement by attaching a rider that includes those terms. In the May 16 Charter Agreement JLM proposed 29 such "Special Provisions" in the attached 4-page rider captioned "M. Special Provisions." JLM's special provisions include three specific amendments to Part II of the ASBATANKVOY and other terms which impose obligations on Stolt-Nielsen not otherwise present in ASBATANKVOY. Most of

JLM's special provisions were included unamended in the May 16 Charter Agreement. Stolt-Nielsen negotiated amendments, mostly minor ones, in only eight of the 29 paragraphs and they are indicated in bold print

10. At no time during the negotiation of the May 16 Charter Agreement did ITC/JLM propose omitting ASBATANKVOY's arbitration clause – arbitration was a term JLM wanted to include. In fact, I am not aware of any instance in which JLM objected to including an arbitration clause.

B. Van Driessche Affidavit Does Not Accurately Reflect Negotiations Between JLM and Stolt-Nielsen

11. Mr. Driessche's affidavit is incorrect regarding many of the facts relevant to the JLM/Stolt-Nielsen agreements. For instance, he states in paragraph 7 that "all the charter parties between JLM Europe and Stolt Tankers contain London arbitration." I am aware of several agreements between JLM Europe and Stolt-Nielsen that provide for arbitration in New York under U.S. law. In fact, all but one of the charter parties between JLM Europe and Stolt-Nielsen identified in the original Complaint provide for arbitration in New York under U.S. law. Attached as Exhibit A is a copy of one such agreement, dated November 21, 2001.

12. Also, Mr. Van Driessche claims in paragraph 27 that, based on his "familiarity with the industry," the "vast majority of maritime arbitrations" "occur in London, under English law." It is true that London arbitration is common if the charterer is not based in the United States. All but one of the 21 charter party agreements JLM identified in the original complaint on behalf of JLM Europe and JLM International, however, provide for arbitration in New York under U.S. law.

13. Mr. Van Driessche's statement in paragraph 9 that the "ASBATANKVOY form was developed by shipowners" is incorrect. It is well known in the industry that ASBATANKVOY has been used in the industry since the late 1970s and is a version of the EXXONVOY '69 form that Exxon developed. Obviously, Exxon, now Exxon-Mobil, is not a parcel tanker shipowner but one of the most sophisticated charterers.

14. Although ASABTANKVOY is one of the most commonly used forms in parcel tanker industry, it is not the only charter form used in the industry. Others include AGILITYVOY, BEEPEEVOY3, VEGOILVOY, EXXONMOBILVOY 2000, and SHELLVOY3.

15. ASBATANKVOY, however, is the charter party form that JLM/ITC proposed for JLM's transactions with Stolt-Nielsen. And having selected ASBATANKVOY, it was JLM/ITC that created the electronic recap of the terms and then drafted the charter party memorializing the agreement and incorporating JLM's special provisions with Stolt-Nielsen's minor amendments.

16. Mr. Van Driessche also states in paragraph 9 that he "has never seen or heard of a charterer being able to avoid arbitration in any charter party dealing with the carriage of any liquefied chemicals." Not all contracts for the carriage of liquefied chemicals require arbitration. Although arbitration clauses are the rule because they are mutually desirable, they are at times omitted. Attached as Exhibit B is the standard AGILITYVOY charter party form. It provides in paragraph 20 that "All disputes arising under this charter party are to be decided according to the laws of England and in the English Courts to the exclusion of all other courts."

17. Another standard charter party used by charterers that excludes any use of arbitration is BEEPEEVOY3. A copy of this charter party is attached as Exhibit C and it provides in paragraph 55:

> The construction, validity and performance of this Charter shall be governed by English Law. The High Court in London shall have exclusive jurisdiction over any dispute which may arise out of this Charter.

The commentary in the BEEPEEVOY3 Appendix I at page 168 regarding paragraph 55 is even more explicit that the parties will litigate, not arbitrate, any disputes:

> This charter is governed by English law. It does not either provide for, or leave arbitration as an option. The High Court in London has exclusive jurisdiction.

Both of these are charter party forms customers use in chartering parcel tankers. Based on these two contracts alone, I disagree with Mr. Van Driessche's assertion in paragraph 9 that "every charterer has to accept arbitration or they will not be offered a ship."

18. Mr. Van Driessche's claim in paragraph 10 that "Every shipowner demands the inclusion of [ASBATANKVOY's] Part II Clause 24 arbitration clause in every charter party agreement I am aware of" is an incorrect overstatement. Not only do most customers who use ASBATANKVOY choose to include the arbitration clause in their proposals, but Stolt-Nielsen, for instance, does not even use ASBATANKVOY with all its customers.

19. For the reasons above I strongly disagree with Mr. Van Driessche's characterization of the arbitration clauses as "contracts of adhesion." The arbitration

clauses are normally sought by charterers – including JLM – and they are negotiated like any other clause, including "demurrage" and "tank cleaning" clauses. Not only the governing law and place of arbitration are open to negotiation, but the very inclusion of such a clause can be part of the negotiations.

/s/ Gregory P. Dooley
Gregory P. Dooley
Assistant Shipbroker

[CAJA A1250-A1254]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JLM INDUSTRIES, INC., JLM INTERNATIONAL, INC., JLM INDUSTRIES (EUROPE) BV, JLM EUROPE BV and TOLSON HOLLAND, individually and on behalf of all others similarly situated, Plaintiffs, vs. STOUT-NIELSEN SA, STOLT-NIELSEN TRANSPORTATION GROUP LTD., ODFJELL ASA, ODFJELL USA, INC., JO TANKERS B.V., JO TANKERS, INC. and TOKYO MARINE CO. LTD., Defendants.	Civ. 3:03 CV 348 (DJS) May 1, 2003

AFFIDAVIT OF PETER WAUGH IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND TO DISMISS OR STAY LITIGATION

Peter Daniel Waugh, being duly sworn, deposes and says:

1. I was employed by Odfjell USA, Inc. ("Odfjell USA") as a Commercial Manager from 2000 until April

1, 2003.[1] Odfjell USA is the commercial agent for Odfjell Americas AS and Odfjell Seachem AS or its predecessor Odfjell Tankers A/S (collectively "Odfjell") that are engaged in the business of maritime shipping of specialty liquids in what is frequently referred to as the parcel tanker shipping trade. My responsibilities as Commercial Manager of Odfjell USA included negotiating spot fixtures and Contracts of Affreightment on behalf of Odfjell for its North American based customers. I make this affidavit on the basis of my personal knowledge and in support of Odfjell's Motion to Compel Arbitration and to Dismiss or Stay Litigation ("Motion to Compel").

2. I am over the age of eighteen and understand the nature and obligations of an oath.

3. In my role as Commercial Manager, I am generally familiar with the international maritime shipping industry and the types of agreements Odfjell USA enters into with its customers to carry cargo. More specifically, I am familiar with the contracts of Odfjell with JLM and its related entities, which are the named plaintiffs in the above-captioned action. All of Odfjell's agreements with JLM entities involved international maritime shipments of cargo.

4. As described more fully below, it has been the standard practice for Odfjell and its customers, including the JLM plaintiffs, to include arbitration clauses in their cargo contracts that require that "any and all disputes of whatsoever nature arising out of" the charter shall be submitted to arbitration.

---

[1] Since April 1, 2003, I have been an employee of Odfjell Terminals USA GP, Inc.

A. Arbitration Is a Standard Feature of Maritime Charter Party Agreements

5. Most of Odfjell's customers are large and commercially sophisticated multinational corporations. These customers have global operations and often enjoy annual revenues greater than those of Odfjell.

6. A significant number of Odfjell's customers insist on using contracts of affreightment that have been drafted by business and legal representatives of the customer to address the customer's specific need. For such contracts of affreightment, the parties - Odfjell and its customer - will engage in extensive negotiations regarding the terms that will govern the relationship.

7. These contracts typically require arbitration, as is the customary practice in the parcel tanker industry. Normally the parties agree to arbitration in either New York or London, long-standing maritime hubs. In such instances the parties usually agree that the laws of that same jurisdiction will govern.

8. Other Odfjell customers prefer to negotiate their business with Odfjell on a voyage-by-voyage, or "spot" basis. Spot customers will negotiate the terms of each spot contract, or "charter party." Such spot customers typically employ the services of a shipbroker. The shipbroker acts as an agent for the customer who has cargo and identifies ship owners who have vessels available to carry the customers cargo. A broker may negotiate with more than one ship owner at a time, and a customer may use more than one shipbroker to find a ship for a given cargo.

9. Commonly the broker will negotiate with the charter party on behalf of the charterer. Because it would be too time-consuming in the spot market to de-

velop new charter party agreements for each voyage, charterers and ship owners use standard charter parties that apply to specified trades, and routes. As a result, shipbrokers and customers routinely use forms and terms that are widely relied upon in maritime shipping. These forms employ terms and established clauses that are known and well recognized within the maritime industry. The forms promote certainly and clarity as to the terms of the contract between Odfjell, as the ship owner, and the customer, as the charterer, and the parties become familiar with their rights and obligations under the agreements.

10. One of the standard voyage charter forms commonly used by shipbrokers in negotiations with Odfjell is a charter party agreement published by an industry trade association, the Association of Ship Brokers & Agents, Inc. ("ASBA"). Founded in 1934, the ASBA has worked to establish standards in the shipping industry. ASBA's roughly 130 members include most of the companies providing parcel tanker brokerage services.

11. ASBA's standard form, the ASBATANKVOY charter party form, has been in use since 1977. It is one of the most commonly used forms in the tanker chartering business and is specifically designed to address the difficulties and risks particular to the shipment of bulk chemicals. This charter party form was originally known as EXXONVOY '69. Exxon encouraged others in the tanker chartering trade to use the form, and ASBATANKVOY eventually adopted it. A true and correct copy of the standard ASBATANKVOY form is attached as Exhibit A.

12. Among its terms, the ASBATANKVOY charter party form includes provisions requiring arbitration

of disputes. Specifically, the first page of the form provides in paragraph K for arbitration in either New York or London. Part II of the ASBATANKVOY form sets forth in greater detail the requirement of arbitration and the nature of such proceedings:

> 24. ARBITRATION. Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York or in the City of London whichever place is specified in Part I of this charter pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen. The decision of any two of the three on any point or points shall be final. Either party hereto may call for such arbitration by service upon any officer of the other, wherever he may be found, of a written notice specifying the name and address of the arbitrator chosen by the first moving party and a brief description of the disputes or differences which such party desires to put to arbitration. If the other party shall not, by notice served upon an officer of the first moving party within twenty days of the service of such first notice, appoint its arbitrator to arbitrate the dispute or differences specified, then the first moving party shall have the right without further notice to appoint a second arbitrator who shall be a disinterested person with precisely the same force and effect as if said second arbitrator has been appointed by the other party. In the event that the two arbitrators fail to appoint a third arbitrator within twenty days of

> the appointment of the second arbitrator, either arbitrator may apply to a Judge of any court of maritime jurisdiction in the city abovementioned for the appointment of a third arbitrator, and the appointment of such arbitrator by such Judge on such application shall have precisely the same force and effect as if such arbitrator had been appointed by the two arbitrators. Until such time as the arbitrators finally close the hearings either party shall have the right by written notice served on the arbitrators and on an officer of the other party to specify further disputes or differences under this Charter for hearing and determination. Awards made in pursuance to this clause may include costs, including a reasonable allowance for attorney's fees, and judgement may be entered upon any award made hereunder in any Court having jurisdiction in the premises.

ASBATANKVOY, Part II ¶ 24. (Ext. A.).

B. Arbitration Clauses in Odfjell's Contracts With JLM Entities

13. Odfjell carried cargo for JLM entities exclusively on a spot basis. Accordingly, each shipment for JLM by Odfjell required a separate agreement defining the contractual terms of the charter.

14. According to JLM's annual report, filed with the U.S. Securities and Exchange Commission, JLM is "a leading global marketer and distributor of performance chemicals" and "one of the largest chemical distributors in North America." 2001 Annual Report at 2, *available at* www.jlmgroup.com.

15. Representatives of JLM and Odfjell separately negotiated each charter party agreement using the standard ASBATANKVOY form. True and correct copies of three such charter party agreements are attached as Exhibits B, C, and D.

16. For most of the charter party agreements concluded between JLM and Odfjell, JLM was represented by a shipbroker. For many, International Tanker Chartering, Inc. was the broker, and its logo appears on the top of the first page of certain of the charter party agreements. See Exs. B-D. As is typical in the industry, the role of the shipbroker in the Odfjell USA/JLM negotiations included responsibility for memorializing on the ASBATANKVOY forms the terms of the charter party as agreed by Odfjell USA and the JLM entity. As reflected by the typed additions and deletions on the attached ASBATANKVOY forms and accompanying riders that make up the charter party agreements, the parties tailored the ASBATANKVOY form for each voyage to reflect the parties' negotiations. See Exs. B-D.

17. In each of the charter party agreements the parties expressly agreed to arbitration in either New York or London, and also expressly agreed that either "U.S. Law" or "UK Law" would govern the arbitration. See Exs. B, C & D.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 1, 2003.

/s/ Peter D. Waugh
Peter D. Waugh

PETITIONER'S BRIEF

No. 08-1198

FILED
AUG 28 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*

PARTIES TO THE PROCEEDING BELOW

The case caption contains the names of all parties who were parties in the court of appeals. KP Chemical Corp. appears in the court of appeals caption, but it was not a party in that court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioners state as follows:

Petitioner Stolt-Nielsen Transportation Group Ltd. is a wholly owned subsidiary of petitioner Stolt-Nielsen S.A., a publicly traded corporation. Stolt-Nielsen S.A. has no parent corporation and no publicly held company owns 10 percent or more of its stock.

Petitioners Odfjell Seachem AS and Odfjell USA, Inc. are wholly owned subsidiaries of petitioner Odfjell ASA, a publicly traded corporation. Odfjell ASA has no parent corporation and no publicly held corporation owns 10 percent or more of its stock. (Since this case commenced, Odfjell Seachem AS has changed its name to Odfjell Tankers AS, and Odfjell ASA has changed its legal status from an ASA to an SE.)

Petitioner Jo Tankers, Inc. is a wholly owned subsidiary of Jo Tankers B.V., which is not a publicly traded corporation. Petitioner Jo Tankers B.V. has one parent corporation, Jo Tankers (Bermuda) Limited, and no publicly held corporation owns 10 percent or more of the stock of Jo Tankers B.V. or Jo Tankers (Bermuda) Limited.

Mitsui O.S.K. Lines Ltd., a publicly traded corporation, owns 10 percent or more of the stock of petitioner Tokyo Marine Co., Ltd.

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IN THE

Supreme Court of the United States

No. 08-1198

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 548 F.3d 85. The opinion of the district court (Pet. App. 35a-44a) vacating the arbitrators' award is reported at 435 F. Supp. 2d 382. The arbitrators' award (Pet. App. 45a-53a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 2008. A timely petition for rehearing en banc was denied on January 12, 2009. Pet. App. 33a-34a. The petition for a writ of certiorari was filed on March 26, 2009, and granted on June 15, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1 *et seq.*), is set forth in full in the appendix to this brief. App. 1a-15a.

STATEMENT

This case presents the question whether the Federal Arbitration Act (FAA) permits the imposition of class arbitration on sophisticated commercial parties engaged in international maritime commerce whose arbitration agreement is silent on the issue.

A. The Parties' Arbitration Agreements

The case arises from a number of disputes subject to international maritime arbitration agreements among multinational corporations involved in oceanic shipping. Petitioners are predominately foreign corporations that operate parcel tankers carrying bulk chemical and other specialty liquids in individual tanks that can be separately chartered. Respondent Animalfeeds International is a multinational corporation headquartered in the United States with foreign affiliates headquartered in Panama and incorporated in both Panama and the British Virgin Islands. CAJA A2346 ¶¶ 10-11.

Petitioners and Animalfeeds entered into several independent bilateral shipping contracts providing for international oceanic transportation of Animalfeeds' cargo. For each shipment at issue, Animalfeeds negotiated a separate "spot" contract with one of the petitioners—*i.e.*, a contract providing for a single shipment in the course of a single voyage. JA66a & n.2, 152a ¶ 8. In keeping with industry usage, these agreements were memorialized in written "charter parties" reflecting the terms negotiated by the charterer (or the shipbroker representing it) and the shipping company. JA152a ¶ 8.[1]

To promote certainty and clarity as to the terms of their agreement, charterers (or their shipbrokers) and shipping companies routinely agree to use form charter parties that are generally appropriate for specified trades and routes. JA152a-153a ¶ 9. These forms employ standard terms and clauses that are known and recognized within the maritime industry and may be

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[1] "The term 'charter party' derives from the Latin, *charta partita* (a divided document), which shows the ancient origin of this arrangement. In the middle ages a contract technique was as follows: An agreement was written out twice on the same piece of parchment, then cut in half on a jagged line (compare the term 'indenture'). Each party would retain a half, and comparing the two halves would prove the agreement's authenticity." T. Schoenbaum, 2 *Admiralty and Maritime Law* § 11-1, at 2 & n.1 (4th ed. 2004); *see also* 8 *Benedict on Admiralty* § 18.01, at 18-2 (7th ed. 2008) (similar). The FAA specifically includes charter parties within its definition of the "maritime transactions" (9 U.S.C. § 1) in which written agreements to arbitrate are to be enforced (*id.* § 2).

readily tailored by further agreement of the parties. *Id.*; *see* JA156a ¶ 16.[2]

All the contracts between Animalfeeds and petitioners were based on the "Vegoilvoy" charter party, which has been in common use for more than 50 years. Pet. App. 5a & n.3, 67a-69a.[3] The Vegoilvoy form was designed for use in international shipping transactions, by parties who are commonly located outside the United States. JA121a ¶ 9, JA124a ¶ 15. Its standard terms include the following arbitration clause:

> Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act, and a judgment

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[2] *See also* R. Force, *Admiralty and Maritime Law* 44 (2004) ("Charter parties typically are negotiated contracts and ... are often marked up—that is, provisions are added, deleted, or modified. These changes reflect the market and the relative financial strength of the owner and charterer.").

[3] The proceedings below initially included some claimants whose disputes were governed by the arbitration provisions in the "Asbatankvoy" charter party. JA66a & n.2. Those claimants are no longer parties to this case. Animalfeeds, however, seeks to represent a class of "[a]ll direct purchasers of parcel tanker transportation services globally[.]" JA67a ¶ 2. Any such class necessarily seeks to include charterers using the Asbatankvoy or other forms or individually negotiated arbitration provisions.

> of the Court shall be entered upon any award made by said arbitrator.

Pet. App. 69a.[4]

Contracting parties of many nationalities—both charterers and shipping companies—may not know or trust the laws or procedures of the various jurisdictions in which they might otherwise be forced to litigate. *See, e.g.*, JA121a ¶ 9, JA124a ¶ 15, JA130a-131a ¶¶ 6-7. They choose instead to resolve disputes through neutral and familiar mechanisms of private international commercial arbitration. JA121a ¶¶ 8-9. The charterer or its shipbroker—not the shipping company—typically selects the charter party form for the transaction. *See, e.g.*, JA144a ¶ 6.[5]

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[4] The United States Arbitration Act was the popular name prescribed by Congress in 1925 when it enacted the precursors to the provisions now commonly known as the FAA. *See* Act of Feb. 12, 1925, Pub. L. No. 68-401, ch. 213, § 14, 43 Stat. 883, 886.

[5] Likewise, the drafting of charter party forms for parcel tanker shipping, such as the Asbatankvoy and Vegoilvoy forms, has historically been the province of charterers, particularly large oil companies seeking to favor their own interests. *See* J. Cooke et al., *Voyage Charters* 589 (1993) ("The draftsmen of the Essovoy (subsequently Exxonvoy and Asbatankvoy) intended to protect oil company charterers from certain risks arising in this trade."); L. Gorton et al., *Shipbroking and Chartering Practice* 106 (5th ed. 1999) ("charter-party forms are dominated by the large oil companies" and "Asbatankvoy corresponds to the previous 'Exxonvoy'") *see also* Gram, *Chartering Problems From An International Point of View*, 49 Tul. L. Rev. 1076, 1084 & n.24 (1974) (Vegoilvoy was "largely ... modeled on Intertankvoy"); 1 D. Yates et al., *Contracts for the Carriage of Goods* 1-24 (1993) ("[T]he Intertankvoy ... was based largely on other oil forms, "especially Exxonvoy 69 (now renamed Asbatankvoy, but identical to the old Exxonvoy 69) and Shellvoy 3 (which predated Shellvoy 5)[.]").

B. Arbitration Proceedings

In 2003, Animalfeeds filed a putative class action against petitioners in federal district court, alleging that the defendants had violated U.S. antitrust laws. Pet. App. 3a. That suit and others were transferred to the District of Connecticut for coordinated proceedings under the multi-district litigation statute, 28 U.S.C. § 1407. In an appeal from those proceedings, the Second Circuit held that the plaintiffs' claims fell within the scope of the parties' agreements to arbitrate. It therefore compelled arbitration pursuant to Section 4 of the FAA, 9 U.S.C. § 4. Pet. App. 3a & n.1 (citing *JLM Indus., Inc.* v. *Stolt-Nielsen SA*, 387 F.3d 163, 183 (2d Cir. 2004)).

Animalfeeds then sought to arbitrate not only its own claims against petitioners, but also the claims of a putative worldwide class of commercial shippers of chemicals, edible oils, acids, and other specialty liquids. Pet. App. 36a. As framed by the demand, the putative class potentially involves thousands of different contracts covering ocean transportation of hundreds of different specialty liquids between scores of ports in dozens of countries.[6] Petitioners opposed Animalfeeds' demand on the ground that they had never consented to class arbitration. *Id.*

Three months before Animalfeeds sued petitioners, this Court decided *Green Tree Financial Corp.* v. *Baz-*

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[6] The demand seeks arbitration on behalf of "[a]ll direct purchasers of parcel tanker transportation services globally for bulk liquid chemicals, edible oils, acids, and other specialty liquids from [petitioners] and their co-conspirators (the 'Class') at any time during the period from August 1, 1998 to November 30, 2002 (the 'Class Period')." JA67a ¶ 2.

zle, 539 U.S. 444 (2003). In that case, the Court had granted certiorari to decide the same question presented here: Whether the Federal Arbitration Act permits the imposition of class arbitration when the parties' agreement is silent on that question. *Id.* at 447 (plurality opinion). The Court did not reach that question, however, because a plurality concluded that arbitrators, rather than courts, should have determined in the first instance whether the parties' contracts were "in fact silent" regarding class arbitration, or whether instead the contracts "forb[ade] class arbitration" by their terms, as the petitioner contended. *Id.* at 447, 452-454.

In light of *Bazzle*, after the Second Circuit held that the charterers' antitrust claims were subject to arbitration and Animalfeeds and others made class demands, the parties here reached a supplemental agreement. Pet. App. 55a-66a. Among other things, they agreed to select a three-arbitrator panel that would initially construe the parties' arbitration clause on the disputed question of class arbitrability, using procedures incorporated from the American Arbitration Association's (AAA) Supplementary Rules for Class Arbitrations. *Id.* at 56a-59a.

Rule 3 of the AAA Supplementary Rules provides that, where a class demand has been made, an arbitrator shall first "determine, as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the 'Clause Construction Award')." JA56a; *see also* Pet. App. 4a (quoting rule). The arbitrator is then to stay the arbitration to permit judicial review of the partial final award. *Id.* Echoing a provision in Rule 3 itself (JA57a), the parties' supplemental

agreement provides that "[n]either the fact of this Agreement nor any of its terms may be used to support or oppose any argument in favor of a class action arbitration ... and may not be relied upon by the Parties, any arbitration panel, any court, or any other tribunal for such purposes." Pet. App. 62a-63a ¶ 15.

In presenting the class issue to the arbitrators, all of the parties agreed that the Vegoilvoy clause was "silent" on the question of class arbitration. Pet. App. 49a. In the face of that silence, petitioners cited federal case law prohibiting class or other consolidated arbitration without all parties' consent. *See* JA101a; Pet. App. 6a, 50a. Petitioners also established that the maritime arbitration clauses at issue had never been the basis for a class arbitration. CAJA A599; *see also* JA126a ¶ 21, JA139a ¶ 24. And they provided, as subsequently noted by the arbitrators, undisputed "declarations and testimony from two experts ... to the effect that sophisticated, multinational commercial parties of the type that are sought to be included in the class would never intend that the arbitration clauses would permit a class arbitration." Pet. App. 51a; *see also* JA119a-141a (reprinting declarations).

Animalfeeds, on the other hand, relied principally on a number of domestic consumer, wage, and franchise arbitration awards in which other arbitrators had permitted class proceedings under "silent" clauses. *See* JA79a-80a; CAJA A1579-A1956; Pet. App. 49a-50a. On that basis, Animalfeeds argued that "public policy favored class arbitration." Pet. App. 6a; *see also* CAJA A308-A309.

The arbitrators accepted Animalfeeds' position, ruling that, by its silence, the Vegoilvoy clause permitted class arbitration. Pet. App. 7a-8a, 52a. Petitioners, the

panel concluded, had failed to "establish that the parties to the charter agreements intended to preclude class arbitration." *Id.* at 51a.

C. Judicial Proceedings

In accordance with Rule 3 of the AAA Supplementary Rules, the panel stayed its award to permit judicial review. Pet. App. 52a. Petitioners sought review in the United States District Court for the Southern District of New York, moving to vacate the panel's award on the grounds that the arbitrators had exceeded their powers and manifestly disregarded the law. CAJA A13-A20.

The district court vacated the award, holding that the arbitrators had "manifestly disregarded a well defined rule of governing maritime law that precluded class arbitration." Pet. App. 41a. Alternatively, it held that "the result would be the same even if there was no established maritime rule and [New York] law then governed." *Id.* The court did not reach petitioners' argument that the arbitrators had exceeded their powers because the FAA does not permit the imposition of class arbitration on parties whose contract is silent on that question. *See id.* at 44a & n.4, 27a-28a.

The Second Circuit reversed. Pet. App. 1a-32a. The court concluded that, although it "might well find [the district court's] analysis persuasive" as an original matter, "the errors it identified" in the arbitrators' award did not "rise to the level of manifest disregard of the law." *Id.* at 21a; *see also id.* at 19a-31a.

The court of appeals also addressed petitioners' argument that the FAA "prohibit[s] class arbitration unless expressly provided for in an arbitration agreement." Pet. App. 28a. That argument relied on the

Second Circuit's previous decisions in *Government of United Kingdom* v. *Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993), which held that arbitrations could not be consolidated without the consent of all parties to the relevant agreements, and *Glencore, Ltd.* v. *Schnitzer Steel Products Co.*, 189 F.3d 264, 266-268 (2d Cir. 1999), which confirmed that district courts had no power "to order either consolidation or joint hearings of two separate arbitrations" where the relevant arbitration agreements did not authorize joint proceedings. Petitioners also pointed to *Champ* v. *Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), which relied on *Boeing* and cases from other circuits and squarely held that "section 4 of the FAA forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter." *Id.* at 275 (relying on *Boeing*, 998 F.2d at 74; *American Centennial Ins.* v. *National Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991); *Baesler* v. *Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); *Protective Life Ins. Corp.* v. *Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989); *Del E. Webb Constr.* v. *Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987); *Weyerhaeuser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984)).

The Second Circuit recognized that these decisions had been "grounded in federal arbitration law to the effect that the FAA itself did not permit consolidation, joint hearings, or class representation absent express provisions for such proceedings in the relevant arbitration clause." Pet. App. 29a. It held, however, that *Bazzle* "abrogated those decisions to the extent that they read the FAA to prohibit such proceedings." *Id.* (citing *Bazzle*, 539 U.S. at 454-455 (Stevens, J., concurring in the judgment and dissenting in part)).

The court concluded that, after *Bazzle*, arbitrators were to approach issues of consolidation, joint hearings, or class arbitration as "issues of contract interpretation to be decided under the relevant substantive contract law." Pet. App. 29a-30a. It then recharacterized *Boeing*, *Glencore*, and *Champ* as "instructive insofar as they may view the silence of an arbitration clause regarding consolidation, joint hearings, and class arbitration as disclosing the parties' intent not to permit such proceedings," but not the source of "a governing rule of contract interpretation under federal maritime law or the law of New York." *Id.* at 30a. On that basis, the court concluded that "[t]he arbitration panel's decision to construe the contract language at issue here to permit class arbitration was ... not in manifest disregard of the law." *Id.* at 30a-31a.

Finally, the court rejected (Pet. App. 31a-32a) petitioners' argument that the arbitrators had "exceeded their powers" within the meaning of Section 10 of FAA, 9 U.S.C. § 10(a)(4). In doing so, the court gave dispositive weight to the parties' supplemental agreement to submit to the arbitrators, in the first instance, the threshold question identified by the plurality in *Bazzle*—*i.e.*, whether their arbitration clause by its terms permitted, precluded, or was silent as to class arbitration. By making that submission, the court held, petitioners had effectively forfeited any right to a judicial determination of a related but distinct legal question: whether an arbitral decision to permit class arbitration *on the basis of a silent contract* exceeded the proper limits of their power under the contract and the FAA. Pet. App. 32a.

SUMMARY OF ARGUMENT

The FAA's "central purpose" is "to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt Info. Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). The Act does not mandate arbitration according to any particular set of procedures. It leaves it to the parties to decide, by written agreement, the nature and scope of their arbitration and the rules under which it will be conducted. Arbitrators derive their power only from the parties' agreement, and the Court has made clear that the metes and bounds of such agreements must be "rigorously enforce[d]." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). Neither statutory nor efficiency concerns may "color the lens through which the arbitration clause is read" to reach a result inconsistent with the parties' agreement. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

In this case, the parties stipulated that because their arbitration agreements were silent on the question of class arbitration, there had been no agreement on that issue. They differed on the legal implications of that lack of agreement. The arbitration panel effectively adopted Animalfeeds' position that class arbitration should be imposed as a matter of public policy, even in the absence of any agreement by the parties to allow it. In doing so, the panel did not base its clause construction award on the actual intent of the parties, but rather on what it selected as a background rule of law to govern *in the absence* of party agreement.

Imposing class arbitration where the parties have not agreed to it cannot be reconciled with this Court's mandate that arbitration under the FAA "is a matter of consent, not coercion," *Volt*, 489 U.S. at 479. Unexpected and involuntary class arbitration fundamentally alters the risks and benefits of the original arbitral bargain. It transforms bilateral, inherently limited commercial disputes into sprawling, high-stakes matters that the parties never agreed to resolve without the safeguards afforded by actual litigation (such as full appellate review). It substantially alters many of the expected benefits of arbitration, such as flexibility, expedition, confidentiality, the parties' right to select different arbitrators to resolve particular disputes, and the promise of reliable, mutual repose once a dispute has been resolved. Uncertainty as to enforcement and finality is particularly acute in the context of international arbitration, because many other countries do not allow class proceedings and may refuse to recognize the binding effect of involuntary class awards. And imposing class arbitration in an international maritime case would be particularly at odds with established practice in the rest of the world. The point is not that class arbitration is necessarily unworkable in all circumstances, but that it is so different from traditional, bilateral arbitration that it may not properly be imposed under the guise of enforcing a conventional arbitration agreement that is silent on the issue.

This case presents no occasion for departing from the FAA's central mandate that arbitration agreements be enforced only in accordance with their terms. First, the Court has made clear that efficiency or similar policy considerations provide no basis for going beyond the agreement of the parties. Second, class proceedings (in arbitration or litigation) are not necessary

to vindicate Animalfeeds' rights under the Sherman Act. On the contrary, Animalfeeds specifically told the arbitrators that "if a class is not certified here Claimants nonetheless will proceed individually to seek a damages award and injunctive relief[.]" CAJA A2366-A2367.

Finally, this case presents none of the issues that might arise in the context of consumer contracts of adhesion. All contracts are construed based on their own terms and context, and some consumer contracts may be properly construed, using conventional intent-based tools, to contemplate class arbitration—for example, by construing an ambiguous contract against a more sophisticated or economically dominant drafter. Alternatively, if true contractual silence results in the unavailability of class arbitration, traditional principles such as fraud, duress, or unconscionability could lead a court to void an arbitration provision entirely under Section 2 of the FAA. Here, however, the parties are sophisticated multinational corporations that negotiated international commercial shipping charters using industry forms that are typically designed and selected by charterers or their brokers (not by shipping companies), that can be and are tailored to reflect individual negotiations between the parties, and that have been in use for decades without any history of class arbitration. Particularly, under these circumstances, arbitrators may not impose class arbitration on the basis of a contract that all agree reflects no agreement to permit it.

The FAA forbids forcing parties into a class arbitration to which they never consented. Arbitrators who, as here, permit class arbitration without party consent have exceeded the powers conferred on them by the parties' agreement, and federal courts must vacate their award. *See* 9 U.S.C. § 10(a)(4).

ARGUMENT

I. THE FAA DOES NOT AUTHORIZE THE IMPOSITION OF CLASS ARBITRATION WHERE, AS HERE, THE PARTIES NEVER AGREED TO CLASS PROCEEDINGS

A. The FAA Authorizes Courts To Enforce Arbitration Agreements Only In Accordance With Their Terms

Section 2 of the FAA directs courts to enforce arbitration agreements:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract.

9 U.S.C. § 2. To effectuate the general mandate of Section 2 that written arbitration agreements (including in "any maritime transaction") be treated as "valid, irrevocable, and enforceable," Section 4 authorizes parties to petition a district court "for an order directing that such arbitration proceed in the manner provided for in such agreement," and authorizes courts to compel arbitration "in accordance with the terms of the agreement." *Id.* § 4. Section 9 authorizes the entry of a court judgment on the arbitrators' award, if the parties have so agreed and if the court has not vacated, modified, or corrected the award on one of the grounds set out in

Sections 10 and 11. *Id.* §§ 9-11. Among other things, Section 10(a)(4) authorizes courts to vacate an award where arbitrators have "exceeded their powers."

As this Court has repeatedly explained, Congress enacted the FAA to "overrule the judiciary's long-standing refusal to enforce agreements to arbitrate" and to "ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-220 (1985); *see also Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 111 (2001); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The Act's legislative history demonstrates that Congress chose the inviolability of the terms of the parties' agreement as the means of overcoming judicial hostility to arbitration. *See, e.g.*, H.R. Rep. No. 68-96, at 1 (1924) ("Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement.").[7] Thus, the "central purpose" of the FAA is "to ensure 'that private agreements to arbitrate are enforced ac-

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[7] *See also id.* at 1-2 (English courts "refused to enforce specific agreements to arbitrate .... The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement."); S. Rep. No. 68-536, 3 (1924) (recognizing "the practical justice in the enforced arbitration of disputes where written agreements for that purpose have been voluntarily and solemnly entered into."); 65 Cong. Rec. 1931 (1924) (statement of Rep. Graham, Chairman of House Judiciary Committee) ("This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts—an agreement to arbitrate .... It does not involve any new principle of law except to provide a simple method by which the parties may be brought before the court *in order to give enforcement to that which [the parties] have already agreed to.*") (emphasis added).

cording to their terms.'" *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt Info. Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)); *see also, e.g.*, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (FAA is "at bottom a policy guaranteeing the enforcement of private contractual arrangements").

Because arbitration "is a matter of consent, not coercion," *Volt*, 489 U.S. at 479, the Act leaves it to the parties to establish the nature and scope of their arbitration, through a "written provision" in a contract or a separate "agreement in writing." 9 U.S.C. § 2. They may identify and limit the issues to be arbitrated, and they may "specify by contract the rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479. "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Id.* at 476.

Arbitration agreements are to be "rigorously enforce[d]." *Byrd*, 470 U.S. at 221. That includes enforcement of the scope, rules, and limitations intended by the parties. "[N]othing in the statute authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered by the agreement." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002); *see id.* at 294. Nor may statutory goals or other policies be invoked to "color the lens through which the arbitration clause is read." *Mitsubishi*, 473 U.S. at 628; *cf. 14 Penn Plaza LLC* v. *Pyett*, 129 S. Ct. 1456, 1467 (2009) ("[T]he arbitrator's task is to effectuate the intent of the parties."); *Gilmer*, 500 U.S. at 34 ("The arbitrator's 'task is to effectuate the intent of the parties' and he or

she does not have the 'general authority to invoke public laws that conflict with the bargain between the parties.'") (quoting *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 53 (1974)).

The terms of an arbitration agreement also delineate the scope of the arbitrator's power. "[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648-649 (1986). The same principle dictates that arbitrators' authority is limited to what the parties have agreed to confer. As the Court has explained:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties.

United Steelworkers of Am. v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) (citation and internal quotation marks omitted); *see also First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944-945 (1995). Arbitrators who move outside those confines, by seeking to impose arbitration to any extent greater than that consented to by the parties, exceed their authority under the FAA. *See* 9 U.S.C. § 10(a)(4).[8]

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[8] Contrary to the court of appeals' view (Pet. App. 29a), nothing in *Bazzle* suggests a departure from this Court's consistent holdings that, under the FAA, the scope of arbitrators' power is

Accordingly, there is special "significance [to] having arbitrators decide the scope of their own powers." *First Options*, 514 U.S. at 945. While arbitrators have wide latitude to decide the issues committed to them, the Court has recognized that the question of what powers the parties have conferred on the arbitrators—for instance, what issues they agreed to submit to arbitration—is normally one for independent resolution by a court. *Id.* at 944-945; *see also* 9 U.S.C. § 4 (court will compel arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue"). As the Court has observed, the willingness to enter into agreements to arbitrate particular disputes would be "drastically reduced" if arbitrators were permitted to expand their own mandate whenever a dispute came before them. *AT&T Techs.*, 475 U.S. at 651 (internal quotation marks omitted). A construction of an arbitration agreement that expands the scope of arbitral authority beyond the bounds of the parties' agreement is thus subject to judicial correction under the FAA.

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determined solely by the parties' agreement. The *Bazzle* plurality concluded only that it was for arbitrators to determine, in the first instance, whether the contracts in question there were in fact silent on the issue of class arbitration. 539 U.S. at 447. It did not reach the question originally presented there and now at issue here—whether an agreement that is, in fact, silent on the issue nonetheless somehow authorizes arbitrators to impose class arbitration.

B. The Arbitration Proceedings Here Confirm That The Parties Never Agreed To Class Arbitration

In this case, the parties are all sophisticated businesses and repeat players in a well-established international market for the maritime transportation of commercial cargo.[9] Animalfeeds from time to time entered into bilateral spot contracts with one or another of the petitioners. Each charter party was based on the Vegoilvoy form. That standard contract allows parties to engage in shorthand specification or tailoring of key terms for each transaction, against a background of industry-recognized terms that are set out in detail in the form (*see* JA9a-31a) and informed by longstanding industry custom and usage. These include an arbitration clause that, as described above, provides that any dispute arising under the contract will be settled by arbitration in New York (a long-time center of international maritime commerce), before two individuals "experienced in the shipping business" (and, if they cannot agree, an admiralty lawyer they select), "in conformity with the provisions and procedure of the [FAA]." *See supra* pp. 4-5; JA30a.

After parallel litigation confirmed that its antitrust claims were subject to arbitration, Animalfeeds filed a demand for class arbitration. In light of the ruling in *Bazzle* that arbitrators should consider, in the first in-

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[9] *See, e.g.*, Force, *supra*, at 44 ("The rules applicable to charter party disputes derive from the terms of the charter party itself and generally do not implicate public policy concerns. These are contracts between businesspersons, negotiated at arm's length, often through intermediaries (i.e., brokers who are experts in the field).").

stance, whether an arbitration agreement was "silent" as to class arbitration, the parties entered into their supplemental agreement (Pet. App. 55a-63a), establishing procedures for testing Animalfeeds' claim that the Vegoilvoy arbitration clause permitted class arbitration and, if so, for conducting that arbitration (*id.* at 59a-63a). Under those procedures, the first issue presented for resolution would be "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." JA56a (AAA Suppl. Rule 3); Pet. App. 59a (adopting AAA Suppl. Rules 3-7); *see also* Pet. App. 48a.

In briefing and argument, the parties agreed that the Vegoilvoy arbitration clause was silent on the issue of class arbitration and that there had been no actual agreement to permit it. Pet. App. 49a; *see, e.g.*, JA77a; CAJA A605, A1567. The parties differed, however, as to the contractual and legal implications of that lack of agreement.

Petitioners submitted undisputed maritime custom-and-usage evidence that the Vegoilvoy's arbitration clause was "part of a long tradition of maritime arbitration peculiar to the international shipping industry" and that it had "never been the basis of a class action." Pet. App. 51a. In particular, petitioners submitted unrebutted expert declarations "to the effect that sophisticated, multinational commercial parties of the type that are sought to be included in the class would never intend that the arbitration clause[] would permit a class arbitration." *Id.*; *see also* JA119a-139a (reproducing declarations). In effect, petitioners argued both that, in context, the Vegoilvoy clause should be construed to prohibit class arbitration as a matter of properly inferred intent and that, in any event, as a matter of law class arbitration could not proceed without the

affirmative agreement of all parties. *See, e.g.*, CAJA A605-A608; JA89a-92a.

Animalfeeds, on the other hand, submitted no evidence from which the arbitrators could have inferred anything about the parties' actual understandings or intent. It argued only that "when a contract is silent on an issue, there has been no agreement that has been reached on that issue[.]" JA77a. Rather than any theory of actual agreement, Animalfeeds relied on arbitral awards from other panels that had allowed class arbitration based on silent clauses, in the context of consumer contracts of adhesion and other contracts between parties of unequal sophistication and bargaining power. Pet. App. 49a-50a; JA79a-83a. Where the parties' contract is silent, Animalfeeds contended, class proceedings should be permitted as a default rule of law:

> The parties' arbitration clause should be construed to allow class arbitration because (a) the clause is silent on the issue of class treatment and, without express prohibition, class arbitration is permitted under *Bazzle*; (b) the clause should be construed to permit class arbitration as a matter of public policy; and (c) the clause would be unconscionable and unenforceable if it forbade class arbitration.

CAJA A308-A309.

The panel rejected Animalfeeds' argument that *Bazzle* required the parties to expressly preclude class arbitration (Pet. App. 49a), and did not address unconscionability. Instead, the panel effectively accepted the argument that a silent arbitration clause should be "construed" to permit class proceedings as a matter of public policy. Citing the other arbitral awards submit-

ted by Animalfeeds, the panel expressed concern that a contrary rule would leave "no basis for a class action absent express agreement among all parties and the putative class members" (*id.* at 51a), and concluded that the countervailing "concern" raised by petitioners—"that the bulk of international shippers would never intend to have their disputes decided in class arbitration"—could "better be dealt with later" through the panel's management of any class proceedings (*id.* at 52a). Specifically, the panel indicated (*id.*) that, if it certified a class, it would consider requiring putative members to "opt in" to the proceedings—in effect, giving the charterers but not the shipping companies a unilateral right to choose their preferred type of arbitration. The panel offered no contractual or other explanation for that potential asymmetrical treatment. On these policy grounds, the panel ruled that class arbitration would be permitted because petitioners had failed to convince the panel that the parties intended to preclude it. *Id.* at 51a.

In reaching that result the arbitrators exceeded the limits of their authority, and the court of appeals erred in reinstating their award. The parties submitted to the arbitrators the question suggested by the plurality in *Bazzle*: Whether their original arbitration agreement revealed an intent to permit or preclude class arbitration, or was simply silent on the question. *See* Pet. App. 59a ¶ 7, 62a ¶ 15. Having concluded that it was silent (and having rejected petitioners' position that a contractual intent to preclude could be inferred from the circumstances of the agreement, including undisputed industry custom and usage), the arbitrators decided to permit class arbitration on pure policy grounds. By imposing class arbitration without the ac-

tual consent of all parties, the arbitrators "exceeded their powers" under the FAA. 9 U.S.C. § 10(a)(4).

The court of appeals should have sustained the vacatur of the arbitrators' award on that basis. Instead, believing incorrectly that appellate precedent on the question had been "abrogated" by *Bazzle* (Pet. App. 29a), the court held that the arbitrators' decision to "construe" the Vegoilvoy arbitration clause as permitting class arbitration was "not in manifest disregard of the law" (*id.* at 31a).[10] It also refused to review the substance of the arbitrators' decision to determine whether they had "exceeded their powers" under Section 10(a)(4), on the erroneous ground that the parties' supplemental agreement committed the question of the arbitrators' authority to order class arbitration to the arbitrators themselves, "irrespective of whether [they] decided the issue correctly." Pet. App. 32a; *see id.* at 31a-32a. But arbitrators who, as here, read a silent arbitration clause to permit them to impose class arbitration based on general principles or policies, rather than on any intent revealed by the parties' agreement, have surely either manifestly disregarded the limits of their commission or otherwise "exceeded their powers." Whatever the rubric, this sort of error directly implicates the limits of the authority the parties conferred on their arbitrators to resolve a dispute. Those limits

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[10] *See, e.g.*, *Wilko* v. *Swan*, 346 U.S. 427, 436-437 (1953) (recognizing "manifest disregard" standard), *overruled on other grounds by Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *First Options*, 514 U.S. at 942 (citing standard from *Wilko*); *Hall St. Assocs., L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008) (citing *First Options* but noting that standard may simply be shorthand for grounds for vacatur specified in 9 U.S.C. § 10(a)(3)-(4)).

must be subject to judicial enforcement under the FAA.

II. IMPOSING CLASS ARBITRATION ON UNCONSENTING PARTIES WOULD FUNDAMENTALLY ALTER, NOT ENFORCE, ARBITRATION AGREEMENTS

The arbitral award in this case purports to construe the Vegoilvoy arbitration clause. Pet. App. 48a, 52a. Instead, the award fundamentally rewrites the parties' agreement. That is why the underlying principle of law that governs here is not a public policy in favor of permitting class arbitration, as the arbitrators concluded (*id.* at 51a-52a), but rather the FAA's fundamental requirement that arbitration agreements be enforced "in accordance with [their] terms" (9 U.S.C. § 4).

When Congress adopted that language, it could not have contemplated that any ordinary arbitration clause would authorize courts to enforce an arbitrator's decision to proceed with class arbitration—let alone *involuntary* class arbitration. Indeed, even federal courts did not entertain modern-form class actions for money damages for more than four decades after enactment of the FAA.[11] The text of the Act does not refer, directly

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[11] *See* 1 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 1:9, at 32 (4th ed. 2002) ("It was not until the promulgation of original Rule 23 and the first Federal Rules of Civil Procedure in 1938 that law and equity were merged and class suits for damages in the United States first became available ...."); *id.* § 1.10, at 34 ("By far the most controversial and dramatic innovation of [1966] amend[ments to] Rule 23 is that all class actions which the court determines to be maintainable [including money-damages actions] will result in a judgment binding on all class members ...."). Congress enacted the FAA in 1925 (*see supra* n.4), codified it into Title 9 of the U.S. Code in 1947, Pub. L. No. 80-202, 61 Stat. 669 (1947), and amended it in 1951, 1954, 1970, 1988, 1990,

or indirectly, to class arbitration. Section 2—the central provision establishing enforceability—speaks in terms of "[a] written provision" or "an agreement in writing," of "an existing controversy" or "a controversy thereafter arising," and of the dispute arising out of "such contract or transaction, or the refusal to perform the whole or any part thereof" or "such a contract, transaction, or refusal." 9 U.S.C. § 2. Likewise, Section 4—establishing a party's right to seek enforcement of an arbitration agreement and the court's power to compel compliance—speaks of "the controversy between the parties" and "an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.* § 4. While this repeated use of the singular may not foreclose class proceedings if multiple related "agreement[s] in writing" actually call for it, *see* 1 U.S.C. § 1 (unless context requires otherwise, singular may include plural), it gives no hint of any legislative intention to permit courts to compel class arbitration without all parties' actual agreement.

To be sure, an arbitration agreement will seldom provide expressly for every procedural detail that might become relevant in handling a particular dispute. *See, e.g.*, Transcript of Oral Argument, *Green Tree Fin. Corp.* v. *Bazzle*, No. 02-634, at 25 (Apr. 22, 2003) (*avail-*

1992, and 2002—never providing for class arbitration. *See* Pub. L. No. 82-248, § 14, 65 Stat. 710, 715 (1951); Pub. L. No. 83-779, § 19, 68 Stat. 1226, 1233 (1954); Pub. L. No. 91-368, §§ 1-3, 84 Stat. 692, 693 (1970); Pub. L. No. 100-669, § 1, 102 Stat. 3969 (1988); Pub. L. No. 100-702, § 1019, 102 Stat. 4642, 4670-4671 (1988); Pub. L. No. 101-552, § 5, 104 Stat. 2736, 2745 (1990); Pub. L. No. 101-650, Title III, § 325(a), 104 Stat. 5089, 5120-5121 (1990); Pub. L. No. 102-354, § 5(b)(4), 106 Stat. 944, 946 (1992); Pub. L. No. 107-169, § 1, 116 Stat. 132 (2002).

able at 2003 WL 1989562) ("They don't consent to every jot and tittle of the means by which the arbitration will be conducted."). As a practical matter, in the absence of further agreement between the parties (such as to a specified body of arbitral rules), it will fall to arbitrators to prescribe incidental procedures that are necessary for them to discharge the responsibilities assigned to them by the parties—briefing deadlines and page limitations, for example, or the availability and nature of pre-hearing discovery. *See Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) ("'[P]rocedural questions which grow out of the dispute and bear on its final disposition' are presumptively ... for an arbitrator[] to decide.") (quoting *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 557 (1964)).

Imposition of involuntary class arbitration cannot, however, be defended as falling within an arbitrator's implicit power to fill incidental procedural gaps left open by the parties' agreement. Imposing class arbitration fundamentally transforms the nature and scope of the proceeding, turning it into something to which the parties never agreed. Arbitrators are not authorized to order such a transformation, and a court applying the FAA must countermand any arbitral award that would have that effect. *See Volt*, 489 U.S. at 474-475 ("[T]he FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement.*'") (quoting 9 U.S.C. § 4) (emphasis in *Volt*); *First Options*, 514 U.S. at 947 ("[T]he basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements are enforced according to their terms and according to the in-

tentions of the parties.") (citations and internal quotation marks omitted).

A. Requiring Arbitration With A Class, Rather Than An Individual Counterparty, Fundamentally Alters The Risk Involved In The Arbitration Bargain

In agreeing to bilateral arbitration, parties elect to " 'trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.' " *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi*, 473 U.S. at 628). Among other things, their choice necessarily reflects a determination that, if disputes arise out of the particular transaction, the added protections of litigation, such as the right to full appellate review, likely will not justify the time and expense involved. *Id.* A key factor in deciding to forgo the safeguards of litigation is, of course, the expectation that the risk of an erroneous result is limited by the likely nature and value of any bilateral dispute arising from the transaction. Unexpected imposition of *class* arbitration, effectively rewriting many individual agreements into one, retroactively alters the core economics of that bargain. It transforms a process for the resolution of bilateral, naturally circumscribed commercial disputes into sprawling, high-stakes quasi-litigation.

This case provides an apt illustration. Animalfeeds' own claims against petitioners involve transactions worth approximately $500,000. Br. of Petitioners-Appellees at 3 & n.4, *Stolt-Nielsen, SA* v. *Animalfeeds Int'l Corp.*, No. 06-3474 (2d Cir. Oct. 12, 2006). With its class claims, however, Animalfeeds purports to represent a global class whose aggregate transactions with petitioners allegedly amount to more than $6.5 billion—13,000 times more than in petitioners' disputes with

Animalfeeds alone. *See* CAJA A79 ¶ 40. Comparable increases in potential liability are likely in any number of other contexts. A party contemplating a commercial transaction might well opt for the streamlined procedures and limited review of arbitration for disputes expected to involve bilateral proceedings and manageable dollar amounts.[12] Such a choice, however, cannot possibly be viewed as an agreement to forgo the safeguards of regular litigation if the dispute may be transformed into a class proceeding involving hundreds or thousands of parties and millions or billions of dollars in potential liability.

Questions from the Court at oral argument in *Bazzle* specifically recognized the enhanced stakes for a party unexpectedly compelled to engage in class arbitration—unanticipated, potentially unreviewable, and exponentially increased liability exposure. *See Bazzle* Tr. 29 ("You might not want to put your company's entire future in the hands of one arbitrator."), 47 ("Without judicial review, would [Green Tree] have rolled the dice for $27 million on one arbitrator?"). As three Justices later noted in dissent, "it would have been reasonable for petitioner to [choose different arbitrators for some or all of the disputes that it had been compelled to defend on a class basis] in order to avoid concentrating all of the risk of substantial damages awards in the hands of a single arbitrator." 539 U.S. at 459 (Rehnquist, C.J., dissenting).

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[12] *Cf. Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280-281 (1995) ("According to the American Arbitration Association ... more than one-third of its claims involve amounts below $10,000, while another third involve claims of $10,000 to $50,000[.]").

Similarly, the Seventh Circuit, in holding that class arbitration may not be imposed in the absence of agreement, recognized that ordering participation in class proceedings to which a party had not agreed would "'disrupt[] the negotiated risk/benefit allocation and direct[] [the parties] to proceed with *a different sort of arbitration.*'" *Champ* v. *Siegel Trading Co., Inc.*, 55 F.3d 269, 275 (7th Cir. 1995) (alterations in *Champ*) (emphasis added) (quoting *New England Energy, Inc.* v. *Keystone Shipping Co.*, 855 F.2d 1, 10 (1st Cir. 1988) (Selya, J., dissenting)). And reported litigation confirms that some potential defendants will reject arbitration altogether rather than agree to arbitrate class claims. *See Shroyer* v. *New Cingular Wireless Services, Inc.*, 498 F.3d 976, 986-987 (9th Cir. 2007) (giving effect to severability provision under which entire arbitration clause became void when express waiver of class arbitration was found unenforceable); *cf. In re Am. Express Merchants' Litig.*, 554 F.3d 300, 321 (2d Cir. 2009), *cert. pending sub nom. American Express* v. *Italian Colors Rest.*, No. 08-1473 (filed May 29, 2009) ("[I]n light of the fact that Amex declared at oral argument that it would reconsider its intention to proceed to arbitration should this Court not enforce the class action waiver, we remand to the district court to allow Amex the opportunity to withdraw its motion to compel arbitration.").[13]

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[13] Even with the protections of judicial proceedings, the massive increase in exposure in one class litigation "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23(f) adv. comm. note (explaining adoption of rule authorizing discretionary interlocutory appeals of class certification orders); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("Certifi-

In short, a shift from individual to class proceedings fundamentally transforms the risk/benefit calculus of the arbitration bargain. When a contract clause is silent on the question, there is no basis for inferring that the parties contemplated, or would ever have agreed to, class arbitration. That is particularly true where, as here, the agreement to arbitrate is between sophisticated commercial parties using a base contract that has been in use for decades in international maritime commerce and has *never* before been invoked as a basis for class proceedings. In these circumstances, compelling or enforcing class arbitration under a silent contract is inconsistent with "the central purpose of the [FAA] to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono*, 514 U.S. at 53-54 (quoting *Volt*, 489 U.S. at 479).

B. The Procedural Complexity And Uncertainty Of Class Arbitration Fundamentally Alter The Benefits Of The Parties' Arbitration Bargain

An involuntary shift to class arbitration also radically alters the benefits of the parties' original arbitration bargain. Conventional, bilateral arbitration promises "simplicity, informality, and expedition," *Mitsubishi*, 473 U.S. at 628, as opposed to the "delay and expense of litigation," *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265 (1995); *see also Circuit City*, 532 U.S. at 123 (quoting S. Rep. No. 68-536, 3 (1924)). Class proceedings, in contrast, are complex, litigious, and slow—as this case amply demonstrates. Conventional

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cation of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

arbitration also offers the opportunity to select particular decision-makers (often with subject-matter expertise), limited involvement by courts, a presumption of confidentiality, and an award that is "mutual, final, and definite" (9 U.S.C. § 10(a)(4)). In these respects, too, class proceedings are fundamentally different.

1. In judicial class actions, courts exercise considerable oversight throughout a case in order to protect both absent class members and class defendants. Rule 23 of the Federal Rules of Civil Procedure, for example, prescribes several procedures unique to class actions, including class certification, *see* Fed. R. Civ. P. 23(b)-(c); potential interlocutory appeal of certification, Rule 23(f); judicial appointment of lead plaintiffs' counsel, Rule 23(g); notice to the absent class members, Rule 23(d); and judicial review of any proposed settlement, Rule 23(e). These class procedures are designed to protect absent class members, to protect defendants against undue pressure to settle, and to ensure that, if the defendant prevails, absent class members will be bound by the judgment. *See, e.g., Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 808-812 (1985).

If class arbitration could be imposed on the basis of a silent contract, parties who agreed to bilateral arbitration of individual disputes would instead face these complex procedures—or, rather, ad hoc private analogues, with no clear contractual or constitutional basis—and accompanying procedural disputes, added layers of judicial review, and inevitable resulting delays. In this case, for example, litigation over class arbitrability has already consumed well over four years. *See* JA76a (class demand filed May 19, 2005). If the arbitrators' clause-construction award stands, the case will proceed to the question of class certification—an inquiry at least as complex in arbitration as its judicial

counterpart under Rule 23—followed by a notice phase and an as-yet-undefined opportunity for absent class members to opt in or opt out. *See* JA59a-61a (AAA Suppl. Rules 5-6); *see also* Pet. App. 52a (arbitrators' recognition of opt-in/opt-out issue). Only after all that could the arbitrators begin to address the merits. And despite these added layers of complexity, it is unclear that these private analogues to litigation could even provide finality and repose without substantial judicial intervention. *See, e.g.*, *Keating* v. *Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982) (class arbitration requires substantial "external supervision" by courts), *rev'd on other grounds sub nom. Southland Corp.* v. *Keating*, 465 U.S. 1, 16 (1984); *see also Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (discussing due process concerns involved in binding absent parties even through judicial proceedings); *infra* pp. 39-41.

The point is not that class arbitration is necessarily unworkable, if all parties have actually agreed to it. It is that parties whose agreement is silent on the matter cannot plausibly be held to have agreed to transform their bilateral disputes into a fundamentally different type of proceeding, involving other parties and other claims arising from other contracts. Coercing an unwilling party into class proceedings on the basis of such an agreement cannot remotely be characterized as enforcing the agreement in accordance with its terms.

2. Another expected benefit of the parties' arbitration bargain upended by involuntary class arbitration is the ability to choose the decision-maker. Traditionally, "adaptability and access to expertise are hallmarks of

arbitration." *Mitsubishi*, 473 U.S. at 633.[14] Moreover, as the Court has observed, "an arbitrator's expertise 'pertains primarily to the law of the shop, not the law of the land,'" and, accordingly, "many arbitrators are not lawyers." *McDonald* v. *City of W. Branch*, 466 U.S. 284, 290 & n.9 (1984).[15] Arbitrators are routinely selected because of specialized industry experience rather than legal training.[16]

Charterers and shipping companies adopting the Vegoilvoy charter party, for example, specify that arbitrators are to be "merchant[s], broker[s] or individual[s] experienced in the shipping business." Pet. App. 69a. The first two arbitrators need not have any legal

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[14] *See also Howsam*, 537 U.S. at 85 ("[T]he NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it."); *Litton Financial Printing Div.* v. *NLRB*, 501 U.S. 190, 213 (1991) ("[A]rbitrators typically have more expertise than courts in construing collective-bargaining agreements.").

[15] *See* F. Elkouri & E. Elkouri, *How Arbitration Works* 177 (6th ed. 2003) (noting that a study of the arbitration profession covering an eight-year period, 1987-1994, found that approximately 40 percent of arbitrators were not attorneys).

[16] *See* T. Oehmke, *Commercial Arbitration* § 70.2 (3d ed. 2009) ("Arbitration clauses may be as specific as the parties desire in describing arbitrator qualifications, or they may be altogether silent. With industry-specific cases, arbitrators are expected to be familiar with the territory and, in fact, are appointed for that very reason; indeed, parties expected them to rely on their own industry experience.") (footnote omitted); *W.K. Webster & Co.* v. *American President Lines, Ltd.*, 32 F.3d 665, 668 (2d Cir. 1994) ("Parties to an arbitration involving a particular trade frequently bind themselves to choose arbitrators who are familiar with the practices and customs of the calling.") (internal quotation marks omitted).

training; if they cannot agree and must appoint another to resolve the dispute, the third is to be "an Admiralty lawyer." *Id.* The assumptions underlying this provision change substantially, however, if the contracting parties must contemplate even the possibility of class arbitration. Presiding over and managing class proceedings (or deciding whether to entertain them) calls for a different sort of expertise—in complex litigation. *Cf. McDonald*, 466 U.S. at 290 ("An arbitrator may not ... have the expertise required to resolve the complex legal questions that arise in § 1983 actions.").

Even more fundamentally, involuntary class arbitration denies defendants their core right to select different arbitrators to resolve disputes with different members of the would-be class. *See, e.g., Lefkovitz* v. *Wagner*, 395 F.3d 773, 780 (7th Cir. 2005) ("Selection of the decision maker by or with the consent of the parties is the cornerstone of the arbitral process."). The right to select the arbitrators for each dispute is typically a central feature of an arbitration agreement. The parties may delegate it (to two panel members to select a third, for example, or to a court to appoint an arbitrator where the parties cannot agree), but unless they do so it remains with them. 9 U.S.C. § 5; T. Oehmke, *Commercial Arbitration* § 71:1 (3d ed. 2009). In particular, no single panel of arbitrators is empowered to decide for itself to hold a class arbitration, thus stripping from all unconsenting parties their foundational right to make their own selections with respect to disputes other than the specific one the particular panel was selected to resolve.[17] Permitting such a decision on the

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[17] Section 5 of the FAA provides that, "[i]f in the agreement provision be made for a method of naming or appointing an arbi-

basis of a silent arbitration agreement is a complete reworking of the agreement—not FAA enforcement of any arbitral bargain the parties ever made.

3. A related expected benefit of agreeing to traditional arbitration is the prospect of bypassing local judicial systems, thus ensuring the ability to select private adjudicators. *See, e.g.*, JA121a ¶ 9, JA124a ¶ 15, JA130a-131a ¶¶ 6-7. This factor is of particular importance for multinational actors in specialized industries, who may prefer to avoid exposure to local tribunals of varying quality, traditions, and expertise, or seek decision-makers with industry expertise. Pet. App. 69a; JA122a ¶ 10, JA130a ¶ 6.

Class arbitration seriously compromises this benefit, because due process concerns will often require substantial judicial participation. *See, e.g.*, *Keating*, 645 P.2d at 1209, 1215-1216 (authorizing involuntary class arbitration and requiring court supervision or approval of class notice process, representation by class representative and class counsel, and any proposed settle-

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trator or arbitrators or an umpire, such method shall be followed." 9 U.S.C. § 5. In this case, involuntary class arbitration would mean that one panel, selected by a limited number of parties to manage preliminary proceedings and construe the parties' original agreement as to the availability of class arbitration (but not necessarily to preside over any individual dispute in the absence of class arbitration, *see* Pet. App. 61a), would assert jurisdiction over disputes with numerous other parties and under numerous other contracts, without observance of the procedures or arbitrator qualifications set forth in the Vegoilvoy arbitration clause. *See Bazzle*, 539 U.S. at 459 (Rehnquist, C.J., dissenting) ("[P]etitioner had the contractual right to choose an arbitrator for each dispute with the other 3,734 individual class members, and this right was denied when the same arbitrator was foisted upon petitioner to resolve those claims as well.").

ment); *Bazzle* v. *Green Tree Fin. Corp.*, 569 S.E.2d 349, 362 (S.C. 2002) ("Protection of the due process rights of absent class members is an essential component of all class actions, and one which may necessitate particular attention in class-wide arbitrations."); *Dickler* v. *Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 (Pa. Super. Ct. 1991) ("In addition to the need for a trial court to initially certify the class and to insure that notice is provided for, the trial court will probably have to have final review in order to insure that class representatives adequately provide for absent class members.") (footnotes omitted). After *Bazzle*, commentators have noted that extensive judicial supervision would be necessary to protect the parties' rights in any putative class arbitration. *See, e.g.*, Clancy & Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law 55, 70-71 (Nov. 2007) (lack of meaningful judicial involvement in class arbitrations jeopardizes due process rights).

This demand for judicial oversight underscores that class arbitration is improper absent actual consent from all parties. Without such consent, extensive judicial supervision of an arbitration, with courts assuming sole responsibility for certain aspects, is entirely inconsistent with the text and purpose of the FAA. *See* 9 U.S.C. §§ 2 (enforceability of agreements to arbitrate), 4 (compelling arbitration "in the manner provided for in such agreement"), 10 (limited grounds for vacatur); H.R. Rep. No. 96, 68th Cong., 1st. Sess. 2 (1924) (FAA intended to allow arbitration "without interference by the court"). In fact, just last year this Court observed that the FAA's review provisions confirm "a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway," ensuring that arbitra-

tion does not become "merely a prelude t a more cumbersome and time-consuming judicial review process." *Hall Street Assoc., L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396, 1405-1406 (2008).

Under the FAA, parties agreeing to arbitration are entitled to expect that they, not a court, will control the procedures for resolving their dispute. *See Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) ("An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."); *Volt*, 489 U.S. at 479 (parties may "specify by contract the rules under which [their] arbitration will be conducted"). While parties may choose to specify complex, cumbersome, and in some cases hybrid procedures, more often it is "a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes." *Mitsubishi*, 473 U.S. at 633. The need for active judicial oversight confirms that an agreement to class arbitration is completely different from, and may not be inferred on the basis of, a traditional agreement to arbitrate that is silent as to the possibility of class proceedings.

4. Class arbitration also differs from traditional arbitration proceedings with respect to confidentiality. As a practical matter, it is difficult for class proceedings to be meaningfully confidential. Indeed, Rule 9 of the AAA Supplementary Rules (JA62a-63a) provides:

> The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations. All class arbitration hearings and filings may be made public, subject to the authority of the arbitrator to provide oth-

> erwise in special circumstances. However, in no event shall class members, or their individual counsel, if any, be excluded from the arbitration hearings.

This departure from the presumption of privacy and confidentiality is unproblematic where parties have agreed to it. It is a dramatic change, however, for parties who agreed to bilateral arbitration agreements on the assumption that their individual disputes would remain private. That concern is particularly acute where, as here, the putative class includes direct business competitors that may be unwilling to disclose sensitive commercial information to one another.

5. One of the most basic expected benefits of conventional arbitration is that it will lead to a "mutual, final, and definite award." 9 U.S.C. § 10(a)(4). With class arbitration, however, defendants may be left with more questions than answers as to mutuality or finality. Indeed, at least absent substantial judicial involvement, defendants face all the disadvantages of class litigation without the compensating advantage of generally assured repose.

From a defendant's perspective, the principal advantage of a class action is finality—obtaining a judgment that will bind the entire class. *E.g.*, *Shutts*, 472 U.S. at 805 ("Whether it wins or loses on the merits, [defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as [defendant] is bound."); *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 (1996) ("Respondents ... were part of the plaintiff class and ... they never opted out; they are bound, then, by the judgment."); *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 402-403 (1980) (avoiding inconsistent judgments is a princi-

pal protection that class actions afford defendants). Such finality cannot be achieved without ensuring adequate due process protections for absent plaintiffs. *E.g.*, *Shutts*, 472 U.S. at 811 ("If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law it must provide minimal procedural due process protection.") (footnote omitted). The FAA, however, does not provide procedures adapted for that purpose, or purport to authorize arbitrators to bind absent class members under any procedure.[18] In short, whether and under what conditions a defense award from an FAA arbitration may be enforced against absent class claimants is a critical but wholly unsettled question.

The uncertainty is especially problematic in the context of international arbitration because many other countries do not allow class proceedings, even in their own courts.[19] In light of this international resistance to class actions, the ability of a prevailing party to enforce a class arbitration award outside the United States under the New York Convention remains very much in

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[18] The FAA's only provision addressing third parties is its authorization of judicially enforceable subpoenas summoning witnesses to appear at arbitral hearings. 9 U.S.C. § 7; *cf. Hay Group, Inc.* v. *E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004).

[19] *See, e.g.*, G. Born, *International Commercial Arbitration*, 1232 (2009) ("In many jurisdictions, class action claims cannot presently be pursued in national courts[.]"); Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. Pa. J. Int'l L. 1, 22 (2008) ("[C]ivil law nations interpret a class action—even with an opt-out provision—as an infringement on a non-representative plaintiff's right to decide when and how to exercise his or her right to a cause of action.").

doubt. *See* United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, art. V(1), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.[20] The Convention allows jurisdictions to decline to enforce a foreign arbitration award on various grounds, including where the award "contains decisions on matters beyond the scope of the submission to arbitration," *id.* at art. V(1)(c), and where "the arbitral procedure was not in accordance with the agreement of the parties," *id.* at art. V(1)(d). It also allows signatories to refuse enforcement of an arbitral award if enforcement "would be contrary to the public policy of [the enforcing] country." *Id.* at art. V(2)(b).[21] Foreign jurisdictions may reach different conclusions on each of these issues when presented in the context of an involuntary class arbitration imposed by U.S. arbitrators on the basis of a silent arbitration clause.[22]

While parties may elect to venture into such legally uncharted waters voluntarily, forcing them there on the basis of a silent arbitration clause cannot possibly be justified as enforcement of a traditional arbitration agreement in accordance with its terms.

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[20] *See also Scherk*, 417 U.S. at 520 & n.15 (describing purpose and effect of New York Convention).

[21] Under Article V(2)(b), "public policy" standards are set according to the standards of the enforcing nation. *See* J. Lew et al., *Comparative International Commercial Arbitration* ¶ 26-112 (2003) ("There are as many shades of international public policy as there are national attitudes towards arbitration.").

[22] *See* Lew, *supra*, at ¶ 16-94 ("There is a real issue whether an arbitration award rendered in multiparty proceedings can be enforced."); *id.* ¶ 16-97 (similar).

6. Finally, imposing involuntary class arbitration on the basis of a silent arbitration agreement would be particularly inappropriate in the context of an international maritime dispute.

The shipping industry's tradition of resolving disputes through bilateral arbitration, on terms acceptable to both charterers and shipping companies, evolved as a matter of commercial necessity. JA121a-122a ¶¶ 8-11; JA130a-131a ¶¶ 5-8. The disputes involved are overwhelmingly international, involving parties from many different countries, shipments between many different ports, and voyages that may proceed through many jurisdictions. JA121a ¶ 9, JA130a ¶ 6; *see, e.g.*, T. Schoenbaum, *Admiralty and Maritime Law* § 11-2, at 4 (4th ed. 2004) ("The market for ships [for charter] is international, and charterers and shipowners customarily deal through professional ship and charter brokers who send and receive telex and other communications all over the world."). These factors, combined with a frequent commercial need for speed, certainty, and confidentiality make it impractical or undesirable to rely on ordinary litigation in national tribunals. JA122a ¶ 11, JA121a ¶ 9 (noting potential for parallel proceedings and jockeying for home-court advantage).

Under these circumstances, a reliable, familiar, mutually acceptable mechanism for private dispute resolution, before appropriate tribunals selected by the parties, with dependable enforcement, is essential to the trade. Unsurprisingly, therefore, "almost every charter party in all the ocean transportation trades provides for arbitration." Association of Ship Brokers & Agents (U.S.A.), Inc. Pet. Stage Amicus Br. at 7. And most of those agreements—including the Vegoilvoy and Asbatankvoy forms (*see* JA30a, JA33a, JA50a-51a)—provide for the arbitration to take place in one of

a handful of traditional maritime centers such as London or New York.

The rule adopted by the arbitrators here—that a silent contract permits arbitrators to impose class arbitration—is wholly at odds with established maritime practice. *See, e.g.*, Society of Maritime Arbitrators, Inc. Pet. Stage Amicus Br. at 4 (noting "total absence of a tradition for class arbitration in maritime disputes"). Indeed, the arbitrators acknowledged petitioners' uncontested proof that "sophisticated, multinational [maritime] commercial parties of the type that are sought to be included in the class would never intend that the arbitration clauses [in standard charter parties] would permit a class arbitration." Pet. App. 51a; *see* Schoenbaum, *supra*, § 11-2, at 4 ("The negotiation and conclusion of a charter party must be understood in the light of long-standing customs and business practices of the shipping industry.").[23] Against this background, there is no way to reconcile the imposition of involuntary class arbitration on the basis of a silent arbitration clause in a maritime charter party with the controlling FAA principle that "[a]rbitration under the Act is a matter of consent, not coercion." *Mastrobuono*, 514 U.S. at 57.

Because class arbitration of maritime disputes is wholly at odds with established maritime practice, allowing it to be imposed here, on the basis of a silent

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[23] As one expert put it in his unrebutted declaration, "I have no doubt that if disinterested owners and charterers who are parties to arbitration agreements identical to those in this matter were asked the question 'Does your arbitration agreement allow third parties to sue or be sued in arbitration as part of a class?' they would reply with a testy 'Of course not!'" JA137a ¶ 20.

maritime arbitration clause, would be inconsistent with the importance this Court has placed on principles of comity in the maritime context and on supporting uniform international application of maritime law. *See, e.g., Kossick* v. *United Fruit Co.*, 365 U.S. 731, 741 (1961) ("[I]t seems to us that this is such a contract as may well have been made anywhere in the world, and that the validity of it should be judged by one law wherever it was made."); *Vimar Seguros y Reaseguros* v. *M/V Sky Reefer*, 515 U.S. 528, 537 (1995) (declining to interpret U.S. law on ocean bills of lading to bar foreign arbitration, which would be "contrary to every other nation to have addressed this issue").[24] The result would be that the nature of a maritime arbitration would vary fundamentally depending on whether the procedure was conducted in the United States or elsewhere in the world.

Moreover, given the maritime context here, one important consequence of the decision in this case could be a shift away from U.S.-based arbitration. If this Court sustains the decision here, then, for the first time (*see* Pet. App. 51a), New York arbitration under a conventional maritime charter party will raise the prospect of class arbitration. That result, startling to the international business community involved, may well cause

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[24] *See also Garret* v. *Moore-McCormack Co.*, 317 U.S. 239, 243 (1942) ("There is no dearth of example[s] of the obligation on law courts which attempt to enforce substantive rights arising from admiralty law to do so in a manner conforming to admiralty practice."); *cf.* Born, *supra*, at 73-74 ("Another essential feature of the neutrality of international arbitration is the use of internationally neutral procedures and rules .... [I]nternational arbitration seeks to avoid the application of domestic litigation rules and instead to apply internationally-neutral procedures tailored to the parties' expectations and dispute.").

parties that would otherwise have selected New York as the site for resolution of their disputes to opt instead for arbitration in London, Singapore, or some other maritime center. *See* JA124a-125a ¶ 16 ("Foreign shipowners and charterers would veto New York arbitration clauses outright if they believed such clauses could embroil them in class actions."); JA137a ¶ 20 ("[I]f reasonable charterers and owners were told that arbitration in New York meant exposure to class actions, they would almost always prefer another arbitral situs.").

III. This Case Offers No Basis For Departing From The FAA's Mandate That Arbitration Agreements Be Enforced According To Their Terms

Because class arbitration is so fundamentally different from traditional bilateral arbitration, it is not surprising that the arbitrators here offered no justification for their decision based on real contractual intent. *See* Pet. App. 50a-52a. Rather, while the arbitrators' reasoning is sparse, it turned on the policy conclusion that class proceedings are a manageable and sometimes desirable method of arbitration that should be available, even though on a true contractual model "there would appear to be no basis for a class action absent express agreement among all parties and the putative class members." *Id.* at 51a.[25]

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[25] As noted above, the arbitrators relied on decisions from other panels, addressing completely different disputes, that allowed class arbitration when the relevant agreement was silent. Pet. App. 49a-50a. Those rulings arose from contexts in which there were disparities in sophistication and bargaining power, such as disputes between consumers and businesses, franchisees and franchisors, or employees and employers. CAJA A1579-A1956. As discussed below, they are inapposite here. This case involves

Likewise, the court of appeals did not reinstate the arbitrators' decision to permit imposition of class proceedings because it thought the arbitrators had properly divined the parties' intent. Instead, it relied on an erroneous conclusion that the various opinions in *Bazzle* had "abrogated" previous decisions holding that the FAA does not authorize imposition of class proceedings absent clear contractual consent. *Id.* at 29a-30a (citing *Boeing*, 998 F.2d at 74; *Glencore*, 189 F.3d at 267; and *Champ*, 55 F.3d at 275). That was an error of law. There is no permissible basis for departing from the rule of those earlier cases that any imposition of class arbitration must be firmly grounded on the actual consent of all parties. No other result can be reconciled with the "consent, not coercion" principle of the FAA. *Mastrobuono*, 514 U.S. at 57.

1. This Court has made clear that efficiency concerns provide no basis for going beyond the parties' actual agreement. Instead, the FAA requires that arbitration agreements be "rigorously enforce[d]" as written, even when doing so may result in duplication or delay. *Byrd*, 470 U.S. at 221. As the Court explained:

> The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. The Act, after all, does not

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(i) sophisticated multi-national commercial parties and (ii) a standard industry base contract, not drafted by petitioners, that has been in use for decades and that parties can and do expressly tailor when necessary to reflect their actual agreement.

> mandate the arbitration of all claims, but merely the enforcement—upon the motion of one of the parties—of privately negotiated arbitration agreements.

Id. at 219. Particularly relevant here, far from permitting arbitrators or courts to consolidate claims in accordance with their own conclusions about efficient process, the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983).

In *Byrd*, for example, the Court considered whether arbitration contracts had to be enforced as written even where doing so would result in bifurcated proceedings—there, arbitration of state-law claims and parallel litigation of federal claims. 470 U.S. at 215-216. It held that strict enforcement was required to "protect[] the contractual rights of the parties and their rights under the Arbitration Act." *Id.* at 221. Similarly, in *Moses H. Cone* the Court affirmed an order requiring arbitration of a discrete set of claims covered by an arbitration agreement, even though it would require bifurcated proceedings—there, arbitration of a liability claim against one party, and state-court litigation of an indemnity claim against another. "Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." 460 U.S. at 20.

The same reasoning applies here. There is no contention that the parties ever actually agreed to class arbitration. Because the arbitrators imposed it anyway, allowing public policy to "color the lens through which the arbitration clause [was] read," *Mitsubishi*,

473 U.S. at 628, their award must be vacated. Such an award exceeds the authority conferred on the arbitrators by the parties' contracts, in manifest disregard of the applicable law. 9 U.S.C. § 10(a)(4); *see First Options*, 514 U.S. at 942. Enforcing it would likewise outstrip the authority conferred on courts by the FAA. 9 U.S.C. §§ 2, 4.

2. Similarly, there is no force to any argument that authority to impose class procedures must be inferred, in the absence of actual agreement, "to vindicate important statutory rights under the Sherman Antitrust Act." Pet. App. 32a & n.17 (court of appeals not reaching argument). On the contrary, this Court has previously rejected the argument that such considerations should be allowed to "distort the process" of applying arbitration agreements in accordance with their terms. *Mitsubishi*, 473 U.S. at 627.

In *Mitsubishi*, the Court held that where the terms of an arbitration agreement encompassed a party's Sherman Act claims and there was no general contractual ground for refusing enforcement of the agreement, the statutory claims were subject to arbitration. *Id.* at 627-628, 640; *see also* 9 U.S.C. § 2 (permitting court to refuse enforcement of arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract"). Similarly, in *Gilmer*, 500 U.S. at 32-33, the Court rejected a general argument that claims under the Age Discrimination in Employment Act could not be arbitrated because of the absence of class arbitration. The Court noted that any argument that the arbitration clause in a particular contract was unenforceable for fraud, duress, or the like were "best left for resolution in specific cases." *Id.* at 33; *cf. In re American Express Merchants Litig.*, 554 F.3d at 320 (express waiver of class arbitration unenforceable as to

antitrust claims where cost of individual proceedings would provide *de facto* immunity to defendant).

Here, the Second Circuit has already expressly rejected—in the related litigation in which it enforced the parties' arbitration agreements—an argument that the arbitration clause in the Asbatankvoy charter party was voidable on general contract grounds as an "unconscionable or oppressive term of adhesion." *JLM Indus., Inc.* v. *Stolt-Nielsen SA*, 387 F.3d 168, 170 n.5 (2d Cir. 2004). For these purposes, there is no basis for distinguishing the Asbatankvoy clause, or the circumstances in which parties agreed to it, from the Vegoilvoy clause at issue in this case.

3. Finally, this case presents none of the issues that might arise in the context of consumer contracts of adhesion, where the question whether class proceedings should be permitted under a facially silent contract might be presented in a somewhat different light.

First, even where a contract is facially silent, some cases involving consumer contracts may be resolved by applying principles of contract construction that look to the parties' actual or properly inferable intent. Some contracts, for example, might have been entered into in a legal context—*e.g.*, expressly invoking the law of a particular State—from which an intent to permit or exclude class arbitration might be inferred. Some might be ambiguous, and properly construed against a more sophisticated or economically dominant drafter. *See, e.g.*, *Mastrobuono*, 514 U.S. at 62 ("[R]espondents cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted

it.").[26] In such cases, it may be appropriate for arbitrators or a court to infer and enforce the parties' contractual intent. Here, however, the clause at issue has been both stipulated and found to be completely silent, and there was no other basis on which the arbitrators could or did infer actual agreement to permit class arbitration. (Indeed, the record evidence was entirely to the contrary. *See, e.g.*, *supra* p. 21; Pet. App. 51a.) Neither Animalfeeds nor the arbitrators has ever suggested any construction of the Vegoilvoy charter party that would permit class arbitration as a matter of actual intent, either express or implied.

Second, as this Court has explained, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements[.]" *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996); *see* 9 U.S.C. § 2; *Mitsubishi*, 473 U.S. at 627; *Gilmer*, 500 U.S. at 33. Courts have invalidated arbitration provisions—or, where class arbitration has generally been permitted, waivers of the right to arbitrate on a class basis—in consumer contexts where they have been deemed unconscionable or contrary to public policy. *E.g.*, *Discover Bank* v. *Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005) (class-action waivers in consumer contracts of adhesion unconscionable under California law where claims involve small dollar amounts and waiver would effectively immunize

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[26] Maritime charter parties, in contrast, are typically concluded on forms proposed (and originally drafted) by charterers or their shipbrokers, not by shipping companies, and in any event are only common starting points for sophisticated merchants fully capable of negotiating changes or replacements if they choose to do so. *See supra* pp. 3-5 & nn.2, 5; Pet. App. 5a & n.3, 67a-69a; JA144a ¶ 6, JA156a ¶ 16; Force, *supra*, at 44.

party with superior bargaining power from liability). As this Court instructed in *Mitsubishi*, however, the right order of analysis is to determine the scope of the parties' arbitration agreement first, and then to determine whether there is any legal impediment to enforcement. 473 U.S. at 628.

Where, as here, the agreement is truly silent, the only proper conclusion is that it does not authorize class arbitration. And even if the issue were open here (which it is not), in this case there is clearly no basis for refusing to enforce that agreement on general contractual grounds. The parties here are sophisticated multinational corporations, with amounts at issue large enough to merit individual enforcement through traditional bilateral arbitration. As Animalfeeds told the arbitration panel: "Unlike cases in which the denial of class certification may sound the 'death knell' of the action, if a class is not certified here Claimants nonetheless will proceed individually to seek a damages award and injunctive relief against [petitioners]." CAJA A2366-A2367. Indeed, similarly situated charterers have already arbitrated or otherwise resolved their claims against petitioners on a bilateral basis. *See, e.g.*, JA99a. Whether a court might properly decide not to enforce a silent arbitration clause in a different type of contract, involving different types of parties, because it did not provide for class arbitration is a question for another day.

* * *

In this case, no party, arbitrator, or court has ever claimed or held that petitioners actually agreed to participate in class arbitration. The arbitrators held that a class arbitration was nonetheless permissible, purportedly on the basis of a contract that is concededly silent

on that issue. Their only rationale appears to have been that other arbitrators had conducted class arbitrations; that it might be desirable to do so in this case; and that if they followed an actual contract theory, "there would appear to be no basis for a class action absent express agreement among all parties and the putative class members[.]" Pet. App. 51a; *see id.* at 49a-52a. That reasoning cannot be reconciled with the FAA. Arbitrators who seek to impose class arbitration *without* "agreement among all parties" (Pet. App. 51a) disregard the law and exceed the authority committed to them by the parties, which comes only from the terms of such an agreement. Applying the FAA, courts must vacate any such award. *See* 9 U.S.C. § 10(a)(4).

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY APPENDIX

Federal Arbitration Act
Title 9, U.S. Code

CHAPTER 1—GENERAL PROVISIONS

§ 1—"Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2—Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3—Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4—Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall

be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 5—Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agree-

ment with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 6—Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§ 7—Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

§ 8—Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

§ 9—Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application

shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10—Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the

award is clearly inconsistent with the factors set forth in section 572 of title 5.

§ 11—Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration--

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12—Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the

adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13—Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

§ 14—Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

§ 15—Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

§ 16—Appeals

(a) An appeal may be taken from--

(1) an order--

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

CHAPTER 2—CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

§ 201—Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

§ 202—Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

§ 203—Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an

action or proceeding, regardless of the amount in controversy.

§ 204—Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

§ 205 —Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

§ 206—Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such

court may also appoint arbitrators in accordance with the provisions of the agreement.

§ 207—Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

§ 208—Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

CHAPTER 3—INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION

§ 301—Enforcement of Convention

The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.

§ 302—Incorporation by reference

Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter "the Convention" shall mean the Inter-American Convention.

§ 303—Order to compel arbitration; appointment of arbitrators; locale

(a) A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether

that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.

(b) In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be appointed in accordance with Article 3 of the Inter-American Convention.

§ 304—Recognition and enforcement of foreign arbitral decisions and awards; reciprocity

Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.

§ 305—Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958

When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:

(1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.

(2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.

§ 306—Applicable rules of Inter-American Commercial Arbitration Commission

(a) For the purposes of this chapter the rules of procedure of the Inter-American Commercial Arbitration Commission referred to in Article 3 of the Inter-American Convention shall, subject to subsection (b) of this section, be those rules as promulgated by the Commission on July 1, 1988.

(b) In the event the rules of procedure of the Inter-American Commercial Arbitration Commission are modified or amended in accordance with the procedures for amendment of the rules of that Commission, the Secretary of State, by regulation in accordance with section 553 of title 5, consistent with the aims and purposes of this Convention, may prescribe that such modifications or amendments shall be effective for purposes of this chapter.

§ 307—Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States.

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
OCT 26

No. 08-1198

IN THE

Supreme Court of the United States

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether arbitrators "exceeded their powers" under the Federal Arbitration Act, 9 U.S.C. § 10(a)(4), when they applied ordinary principles of contract interpretation to hold that a contract clause that broadly requires arbitration of "[a]ny dispute" arising from the contract permits class-wide arbitration.

2. Whether a petition to vacate an arbitration panel's interim decision construing the parties' contract to authorize class arbitration is unripe where the panel has made no determination to certify a class nor ruled on the merits of the claims.

CORPORATE DISCLOSURE STATEMENT

Respondent Animalfeeds International Corporation has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

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BRIEF FOR THE RESPONDENT

INTRODUCTION

Petitioners, Stolt-Nielsen, Odfjell, Jo Tankers, and Tokyo Marine,[1] four of the largest parcel tanker shipping companies in the world, engaged in a multi-year criminal antitrust conspiracy to raise, fix, and maintain prices in the parcel tanker shipping business. The conspiracy affected over $600 million in United States commerce alone, unlawfully extracting above-market prices from hundreds of businesses. Stolt responded to ten civil suits that some of the hundreds of overcharged businesses, including respondent Animalfeeds International Corp. ("Animalfeeds"), filed against them by consolidating the suits before a multidistrict litigation panel and obtaining an order compelling arbitration under the parties' broadly worded arbitration clause. The clause provides for arbitration of "[a]ny dispute arising from the making, performance or termination" of the contract. JA 30a. The parties negotiated a supplemental agreement allocating to the arbitrators the determination whether the clause permits class arbitration. Stolt did not see fit specifically to foreclose class proceedings by contract, nor to claim any right to a threshold judicial—as opposed to arbitral—construction of the arbitration clause. The effect of having committed the

[1] Petitioners are hereinafter collectively referred to as "Stolt" or "petitioners," except where otherwise specified.

contract construction to the arbitrators is that judicial review is very limited. To obtain vacatur here, Stolt would have to show that the arbitrators "exceeded their powers." 9 U.S.C. § 10(a)(4).

When a panel of highly qualified and experienced international arbitrators unanimously issued an interim decision interpreting the parties' arbitration clause to permit class arbitration, Stolt immediately sought to obtain interlocutory judicial review of the decision it had previously committed to the arbitrators. Stolt sought vacatur even before the arbitrators could consider whether to certify a class on the facts of this complaint. Stolt now argues that the businesses seeking restitution must arbitrate one by one, if at all. It asks the Court to adopt the rule it unsuccessfully pressed on the arbitrators: a class action waiver must be implied in an arbitration clause unless the clause specifically authorizes class proceedings by name.

Stolt calls for a broad, FAA-based federal rule for all types of cases, with full preemptive effect in state and federal arbitrations alike, that requires specifically expressed contractual authorization of class arbitration. There is no basis in law for that approach, which conflicts with this Court's established precedent that arbitration contracts are to be interpreted on the same footing as all other contracts. Under maritime and New York contract law alike, a contract's legal effect is determined, not by the kind of rule of extraordinary specificity that Stolt proposes, but by reading its terms in light of rules of contract interpretation and construction. Stolt asks this Court to shear away the corpus of ordinary contract law to

effectuate a new anti-class arbitration presumption. Its rule would broadly displace state law and call into question hundreds of already authorized class arbitrations. This Court should not reach out, especially in a case that comes to it in such an interlocutory and premature posture, to adopt Stolt's proposed broadly preemptive federal rule. The arbitrators acted well within their powers. In the face of the arbitrators' straightforward reliance on maritime and New York contract principles following *Green Tree v. Bazzle*, 539 U.S. 444 (2003), and the extreme judicial deference to arbitration that the FAA requires, *see* 9 U.S.C. §10(a); *Hall St. Assocs., LLC v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), there simply is no ground for vacatur here.

STATEMENT

1. Events leading to the arbitration

The class claims arose out of petitioners' global conspiracy to restrain competition in the world market for parcel tanker shipping services in violation of United States antitrust law. Parcel tankers are ships equipped with multiple tanks that can be separately hired to transport volumes of liquids too small to warrant using a traditional tanker ship. Petitioners are the "big four" parcel tanker companies that dominate the world market for these services. Respondent Animalfeeds is a New Jersey-based company that supplies protein and fat ingredients such as fish oil to animal feed producers in the United States and around the world. Animalfeeds contracts with petitioners to ship its liquids under an industry standard form contract that includes the arbitration

clause at issue here. The arbitration clause broadly requires arbitration of "[a]ny dispute arising from the making, performance or termination" of the contract. JA 30a. It specifies that the arbitration will take place in New York, in accordance with "the provisions and procedures of the United States Arbitration Act," *i.e.*, the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* J.A.30a.

A successful criminal investigation by the United States Department of Justice established, in early 2003, that petitioners had engaged in a criminal global price-fixing conspiracy. Petitioner Stolt was the first co-conspirator to admit fully its participation in the conspiracy and cooperate with the investigation. Early in 2003 the Justice Department accepted Stolt into DOJ's Corporate Leniency Program. CAJA A155-A164. Faced with direct evidence of their criminal activity, other petitioners, Odfjell Seachem AS, Jo Tankers BV, and several of their executives, pleaded guilty to their role in the conspiracy. CAJA A36-A37, A165-A166, A218, A232.[2]

As news of the conspiracy became public, Animalfeeds realized that for several years petitioners had been unlawfully extracting supra-competitive prices for parcel tanker shipping services from Animalfeeds and hundreds of other customers. On September 4, 2003, Animalfeeds sued petitioners for antitrust conspiracy and fraudulent concealment.

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[2] There is information suggesting that Petitioner Tokyo Marine colluded to allocate customers and fix prices, CAJA A35, but Tokyo Marine and its executives were not charged with or convicted of criminal antitrust violations.

CAJA A71. Animalfeeds sought to represent a class of "[a]ll direct purchasers of parcel tanker transportation services globally for bulk liquid chemicals, edible oils, acids, and other specialty liquids from [petitioners] at any time during the period from August 1, 1998, to November 30, 2002." Pet. App. 2a. Other plaintiffs filed parallel suits.

In one such suit filed by another shipper, JLM Industries, Inc., against the same parties that are petitioners here, the district court denied the ship owners' motion to compel arbitration on the ground that the antitrust claims were not covered by an arbitration clause extending only to arbitration of disputes relating to interpretation, construction, or application of the contract itself. The court of appeals reversed. *JLM Indus., Inc. v. Stolt-Nielsen SA,* 387 F.3d 163, 179-181 (2d Cir. 2004). Respondent Animalfeeds was not a party to that appeal, but it established, for purposes of proceedings in the Second Circuit, that it must proceed against Stolt in arbitration, if at all. Pet. App. 3a.

Meanwhile, the United States District Court for the Eastern District of Pennsylvania accepted the sentences recommended by the government pursuant to the guilty pleas, assessing criminal fines against Odfjell and Jo Tankers totaling $62 million, CAJA A229, A236, and sentencing individual executives of those companies to fines and prison terms, A227, A238. As consideration for the government's grant of immunity to it under the Corporate Leniency Program, Stolt-Nielsen promised, *inter alia*, "to make restitution to any person or entity injured as a result of the activity in which [Stolt] participated." CAJA A208.

They have failed to fulfill that promise, necessitating their inclusion in the arbitration they now challenge. The government did not seek restitution against Odfjell and Jo Tankers, observing:

> [A] number of civil suits have been filed by potential victims against [Stolt-Nielsen] and other parcel tanker shipping companies. In light of the pending civil actions and because of the complicated nature and large number of contracts involved, the Government respectfully submits that determining the amount of victims' losses would complicate or prolong the sentencing process.

CAJA A226, A242. The amounts Odfjell and Jo Tankers were required to pay were thereby reduced in anticipation of recovery of restitution in cases such as this one.

With this class action and several other civil antitrust lawsuits pending against them around the country, Stolt successfully moved the Judicial Panel on Multidistrict Litigation to consolidate the cases. Adopting Stolt's own argument to that effect, the panel found centralization was "necessary in order to avoid duplication of discovery, prevent inconsistent or repetitive pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary." *In re Parcel Tanker Shipping Servs. Antitrust Litig.*, 296 F. Supp. 2d 1370, 1371 (J.P.M.L. 2003).

In preparation for arbitration, the parties entered into an Agreement Regarding New York Arbitration Procedures For Putative Class Action

Plaintiffs in Parcel Tanker Services Antitrust Matter, Pet. App. 55a (the "Supplemental Agreement"). That Agreement established the terms for selecting arbitrators empowered to decide whether to certify a class, and to determine liability and award damages to class members. *Id.* at 60a (¶¶10-11). The Agreement states that the parties "seek to avoid duplicative discovery and other related inefficiencies in connection with New York arbitrations of [class claimants'] claims," *id.* at 55a (¶1), and accordingly specified they would "follow and be bound by Rules 3 through 7 of the American Arbitration Association's Supplementary Rules for Class Arbitrations (as effective Oct. 8, 2003)," [AAA Class Rules]. *Id.* at 59a (¶7). The AAA Class Rules respond to this Court's decision in *Green Tree v. Bazzle,* 539 U.S. 444 (2003), by providing procedures for arbitrators to decide whether an arbitration clause permits class arbitration, and to certify classes in appropriate cases under criteria that largely track the most demanding requirements of Federal Rules of Civil Procedure 23(a) and (b)(3) (including requirements of notice to class members and an opportunity to opt out). JA 55a-65a. Of central relevance here in determining the standard of judicial review of the arbitrators' decision, the parties agreed that the arbitrators would decide "whether the applicable clause permits the arbitration to proceed on behalf of or against a class." *Id.* at 56a.

In the Supplemental Agreement, Stolt specifically reserved various rights. *See, e.g.*, Pet. App. 60a (¶11) (separate damages determinations by the panel or separate panels); *id.* at 60a-61a (¶12) (consolidation, if class certification is denied); *id.* at 62a (¶14) (scope of discovery). It did not, however, reserve

any right to challenge assignment to the arbitrators of the decision whether the arbitration clause permits class arbitration. The Agreement specified that neither its existence nor its terms could be used "to support or oppose any argument in favor of a class action arbitration or the scope and composition of the proposed class," *id.* at 62a-63a (¶15), *i.e.*, the questions whether, on these facts, a clause construction permitting class arbitration is allowable under the FAA and whether and how a class proceeding should go forward. CAJA A152. The Agreement did not, however, reserve any objection to its own (and *Bazzle*'s) allocation of clause construction to the arbitrators, *i.e.*, the question "who decides." *See First Options of Chicago v. Kaplan*, 514 U.S. 938, 942-43 (1995).

2. The Arbitrators' Preliminary Ruling

Pursuant to their Supplemental Agreement, the parties selected Kenneth Feinberg and William R. Jentes, who together chose Gerald Aksen as the panel chair. All three panelists are leaders in the international dispute resolution bar with extensive experience resolving complex United States and international cases, including class-wide cases and antitrust disputes. Mr. Aksen, who specializes in complex and international cases, was American Vice Chairman of the International Chamber of Commerce (ICC) International Court of Arbitration, Vice President of the London Court of International Arbitration (LCIA), and served as General Counsel and on the Board of Directors of the American Arbitration Association (AAA). Mr. Jentes was a litigation partner at Kirkland & Ellis LLP for 40 years and has served as a neutral for the International Chamber of Commerce,

the AAA, JAMS The Resolution Experts, and the CPR Institute for Dispute Resolution on hundreds of cases, including antitrust and many international arbitrations. Mr. Feinberg, a former partner at Kaye Scholer LLP and founder of Feinberg Rozen LLP, was Special Master of the Federal September 11th Victim Compensation Fund, currently serves as Special Master for Executive Compensation under the Troubled Asset Recovery Program ("Wall Street Pay Czar"), and has served as a neutral in hundreds of disputes involving breach of contract, antitrust, and a wide range of commercial and other matters. *See* CAJA A2157 nn. 5-7.

Before they construed the arbitration clause, the arbitrators accepted briefing and evidence, including the testimony of Stolt's experts, and heard detailed oral argument from both sides. JA 77a-141a; CAJA A296-A1984. On December 20, 2005, the panel issued its unanimous, written opinion holding that the arbitration clause permitted class arbitration. Pet. App. 45a-53a.

The arbitrators treated the arbitration clause itself as the touchstone for deciding the question; they did not, as Stolt repeatedly contends, "impose [class arbitration] as a matter of public policy." Pet. Br. 12, *see id.* 8, 23, 24, 25, 45. Following *Bazzle,* the arbitrators "look[ed] to the language of the parties' agreement to ascertain the parties' intention whether they intended to permit or preclude class action." Pet. App. 49a. The panel noted that it was guided in that task by New York law and federal maritime law of contract interpretation. *Id.* at 49a-52a. The arbitrators carefully construed the contract language, quoting its

sweeping requirement that the parties arbitrate "any dispute arising from the making, performance or termination" of the contract. Every arbitrator faced with "the same type of broad wording" in a contract had, they noted, held class arbitration to be authorized. *Id.* at 50a. The arbitration panel acknowledged Stolt's expert testimony that this particular clause never had been the basis of a class action, but observed that broadly worded clauses are often held to authorize categories of disputes for the first time; so, too, the broad language here, admittedly presenting an issue of "first impression," could be construed as authorizing class treatment. *Id.* at 49a, 51a-52a.

The arbitrators considered Stolt's objections to the potentially international scope of the class to be premature and more appropriate to the next phase of the proceeding. At that stage, the arbitrators noted, they could address whether there is a viable class warranting certification, what its scope might be, and whether the international sweep of the conspiracy might require adaptations, *e.g.*, that foreign putative class members might have to "opt in" rather than merely decline to opt out in order to be included and bound. *Id.* at 52a.[3]

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[3] By separate order, the panel granted Stolt's motion to dismiss claims governed by clauses selecting a non-United States arbitration forum; the panel deferred its decision on Stolt's motion to dismiss certain remaining claims that Stolt contended were outside United States commerce. The panel also deferred decision on Animalfeeds' motion for discovery.

3. The District Court Decision

Acting before this Court's decision in *Hall Street Associates v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), which held that the FAA's statutory grounds in 9 U.S.C. § 10(a) are the exclusive bases for review of arbitration awards, the district court applied a "manifest disregard" standard to vacate the panel's contract construction. Pet. App. 37a, 41a. The district court acknowledged that the issue was for the arbitrators in the first instance under *Bazzle*, but vacated the award for "fail[ure] to make any meaningful choice-of-law analysis." *Id.* at 38a. The district court held that maritime law applied, and that the panel's ruling manifestly disregarded what the court took to be "an established federal maritime rule." *Id.* at 38a-39a. That rule, the court held, was supplied by maritime "custom and usage" as described by Stolt's experts, *id.* at 39a-40a—even though the experts did not testify to any special arbitration tradition peculiar to the maritime industry, nor any instances in which the class issue ever had been raised and disavowed for that industry. *See* JA 119a-141a.

4. The Court of Appeals Decision

The court of appeals unanimously reversed. The panel (Sack, J., joined by Kearse and Livingston, J.J.) reviewed the district court's decision *de novo* and, acting in the wake of *Hall St.*, 128 S. Ct. 1396, applied the Second Circuit's "manifest disregard" standard narrowly, as "a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA." Pet. App. 16a-17a. The court acknowledged that, but for the Second Circuit's continued adherence to the manifest

disregard standard, the court would have been required to order the district court to dismiss the vacatur petition. *Id.* at 19a. The court of appeals instead reversed and remanded because the arbitrators had not manifestly disregarded the law. *Id.* at 21a.

The court held that Stolt had waived any choice-of-law objection by having argued to the arbitrators that they "need not decide" whether New York or federal maritime law applied, "because the analysis is the same under either." *Id.* at 21a (*quoting* Stolt-Nielsen's Arbitration Br. at 7 n.13 [CAJA A604]). The court also found that, due to the absence of conflict between New York and maritime contract law, there was in fact no need to choose. *Id.* at 22a n.12. The arbitration panel did "what Stolt-Nielsen had asked it to do" by referencing New York and maritime law.

The court concluded that the arbitrators' decision was not in manifest disregard of maritime law, given the absence of any clearly defined governing legal principle of which the panel was aware but refused to apply. Pet. App. 21a (*citing Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003)). It found no established "federal maritime rule of construction specifically preclud[ing] class arbitration where a charter party's arbitration clause is silent." Pet. App. 23a-24a. The court was not persuaded by Stolt's contention that the arbitrators were somehow legally required to find Stolt's experts' testimony dispositive; the arbitrators had "considered Stolt-Nielsen's arguments and found them unpersuasive" on that point. *Id. at* 25a. The court of appeals stressed that "an arbitrator's interpretation of a contract's terms [i]s an area we are

particularly loath to disturb," and that "determinations of custom and usage are findings of fact...which federal courts may not review even for manifest disregard." *Id.* at 24a, 25a.

The court of appeals also found no manifest disregard of New York law. Under binding New York Court of Appeals precedent, which the arbitrators cited, *see* Pet. App. 49a, the parties' intent must be the focal point in contract interpretation, but intent may be discernible "even if the contract is silent on the disputed issue." *Id.* at 26a-27a (*quoting Evans v. Famous Music Corp.*, 1 N.Y.3d 452, 458 (2004)). The court of appeals reasoned that silence may "bespeak[] an intent not to preclude class arbitration." Pet. App. 27a.

The pre-*Bazzle* precedents that Stolt cited in support of its objections that the FAA categorically disallows class arbitration absent express provision were, according to the court of appeals, limited by *Bazzle*'s holding that "the question whether the agreement permits class arbitration is generally one of contract interpretation to be decided by the arbitrators, not by the court." *Id.* at 29a. The court held that each of the three older opinions upon which Stolt placed primary reliance—two anti-consolidation cases, *Glencore, Ltd. v. Schnitzer Steel Products*, 189 F.3d 264 (2d Cir. 1999), and *United Kingdom v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993), and one Seventh Circuit case deciding against class arbitration, *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995)–"had been grounded in federal arbitration law to the effect that the FAA itself did not permit consolidation, joint hearings, or class representation absent express

provisions in the relevant arbitration clause." Pet. App. 29a. After *Bazzle*, "arbitrators must approach such questions as issues of contract interpretation to be decided under the relevant substantive contract law"; Stolt's authorities do not reflect "a governing rule of contract interpretation under federal maritime law or the law of New York. And it is the governing rules of contract interpretation that arbitrators must consult." *Id.* at 29a-30a.

The court of appeals separately considered whether the arbitrators "exceeded their powers" under 9 U.S.C. §10(a)(4) in deciding the issue of contract interpretation. They held that the parties' Supplemental Agreement assigning clause construction to the arbitrators undercut any such claim. Pet. App. 31a-32a. The court noted, but found it unnecessary to rule on, Animalfeeds' contention that class arbitration is necessary to vindicate important statutory rights under the Sherman Antitrust Act. *Id.* at 32a n.17. The court denied rehearing. *Id. at* 33a-34a.

SUMMARY OF ARGUMENT

At issue here is the preliminary decision of a unanimous panel of three experienced arbitrators who held that the parties' broad arbitration clause—requiring arbitration of "*any dispute* arising from the making, performance or termination of the contract"—permits the civil cases for restitution to be arbitrated on a class-wide basis. The arbitrators have not yet decided that the case will, in fact, proceed as class arbitration, nor have they certified any class.

I. A. The parties' Supplemental Agreement, written when the case was pending, assigned the task of construing the arbitration clause to the arbitrators. Stolt endorsed that assignment repeatedly, orally and in writing, throughout the proceedings below. *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444 (2003), requires that allocation in any event, and Stolt has waived any contrary claim.

B. Under the FAA, parties agreeing to arbitrate trade away much of the value of ordinary judicial review. Instead, they accept very minimal review of any matter delegated to the arbitrators. Matters committed to arbitrators are subject to vacatur only on narrowly circumscribed statutory grounds, 9 U.S.C. §10(a), including the one on which Stolt relies to claim that the arbitrators "exceeded their powers," *id.* §10(a)(4). Under that standard, ordinary legal error would not suffice; what is required is effectively a showing that the arbitrators acted *ultra vires.*

II. The arbitrators did not exceed their powers here, because they decided precisely what the parties asked them to decide: whether the contract permits class arbitration.

A. Class proceedings are not incompatible with arbitration, and Stolt concedes as much. The jurisprudence of this Court reads the FAA to repose great confidence in arbitrators on even complex matters of great public moment, and that confidence is borne out with respect to class proceedings by a growing body of experience. Hundreds of class proceedings have been successfully administered by major institutional arbitration service providers,

including the American Arbitration Association, under specialized sets of class arbitration rules they have developed in response to *Bazzle*.

B. Under this Court's established FAA decisions, state contract law governs interpretation of an arbitration clause. That is so even where federal law creates the substantive claim, as the Sherman Act does here; there is no general federal common law of contract interpretation, and the FAA is not a mandate to create one. The arbitrators in this case permissibly held that, under traditional contract rules, a clause broadly providing for the arbitration of "any disputes" authorizes class arbitration, even though the clause did not specifically mention it as such—*i.e.*, it was "silent" on the issue. That result comports with *Bazzle*, with specific New York precedent sustaining arbitrators' power to conduct class and consolidated arbitrations under similarly broadly worded clauses, with general principles of New York and maritime contract law, and with the contract constructions of scores of other arbitrators who have applied the ordinary contract principles of multiple states to construe similar terms to permit class arbitration.

C. Stolt seeks vacatur based on its proposed new FAA-based rule that would bar class arbitration unless the contract specifically mentions class proceedings with approval. That rule, it urges, should displace the arbitrators' application of common principles of state contract law. Stolt misreads the FAA's direction to enforce arbitration contracts "in accordance with their terms" as prohibiting arbitrators from acting—in particular, conducting class proceedings—unless the contract authorizes the action by name. This Court has

never read the FAA to impose any such limitation, and it should not do so now. Instead, the statutory reference to interpretation of contracts "in accordance with their terms" requires resort to ordinary principles of state contract law, which is precisely what the arbitrators did here.

D. There is no justification for this Court to create a new federal maritime version of Stolt's proposed rule. There is no maritime law specific to the question of class arbitration, and general maritime contract principles accord with those of New York and many other jurisdictions. Federal courts have a limited mandate to create special contract rules where necessary in admiralty. The interests that Stolt identifies with maritime arbitration are not, however, specific to it, but broadly apply to arbitration in most international and domestic settings, and warrant no special rule.

E. Stolt contends that class arbitration would fundamentally alter the risks and benefits of the parties' arbitration agreement. Petitioners are major international businesses. In entering a broad arbitration clause without incorporating any specific procedural rules, they took the risk that the arbitrators would apply rules they did not like. None of the various policy concerns Stolt raises about class arbitration—including complexity, potential need for judicial oversight, and asserted non-finality—requires vacatur here.

F. The established rule of contract construction requiring that contracts be read so as to serve the public interest adds support to the arbitrators' decision

here. Foreclosing class arbitration under broad clauses like this one would lead either to the inefficiencies and unfairness of multiple, separate arbitrations on common issues, or, more realistically, would make it untenable for would-be class members to proceed individually. The enormous costs of duplicating the complex proof of antitrust injury in individual arbitrations would discourage most claimants from proceeding, resulting in dramatic under-enforcement of the Sherman Act.

III. Finally, the vacatur petition is unripe. The arbitrators merely issued an interim interpretation, and have not yet even decided whether to certify any class. Stolt has suffered no constitutionally cognizable harm; all it faces is further arbitration. The interlocutory petition for vacatur perversely arrogates to Stolt, as an arbitrating party, earlier and more frequent and extensive opportunities for judicial review than are enjoyed by parties to class actions in federal or state courts. To allow review of the arbitrators' interim decision at this preliminary stage would turn on its head the FAA's purpose of providing streamlined and simplified proceedings, and instead reflect the very hostility to arbitration that the FAA was designed to reverse.

ARGUMENT

I. THE PARTIES ASSIGNED THE CONTRACT CONSTRUCTION DECISION TO THE ARBITRATORS, WHOSE DECISION IS SUBJECT TO EXCEEDINGLY LIMITED JUDICIAL REVIEW

A decision to arbitrate rather than litigate trades the judicial review that would otherwise be available for the efficiency and certainty of a largely unreviewable arbitral award. Where, as here, the parties agree to present a matter to arbitrators, judicial review of the arbitrators' decisions is extraordinarily limited, focusing on truly aberrant events, such as arbitrator "corruption," "fraud," "evident partiality," "misconduct," or "misbehavior." 9 U.S.C. §10(a)(1)-(3)—or, under the provision Stolt invokes, conduct by arbitrators that "exceeded their powers." *Id.* §10(a)(4). Under the demanding Section 10(a)(4) standard, it is not enough that a court would reach a different conclusion from the arbitrators, or even that the arbitrators clearly erred; rather, a court must find that the arbitrators acted in an essentially *ultra vires* fashion. As long as the arbitrator is "even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987). As the Court has explained, a party without an arbitration agreement has a full right to judicial review, but where a party agrees to arbitrate, it "relinquish[es] much of

that right's practical values"; the party "still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances." *First Options*, 514 U.S. at 943. Stolt has shown no such exceptional circumstances here.

A. The Parties Empowered the Arbitrators to Decide Whether the Clause Permitted Class Arbitration

Stolt emphatically insisted in the prior proceedings in this case that the arbitrators had the power to construe the arbitration clause to permit class arbitration. Stolt negotiated the Supplemental Agreement expressly providing that the arbitrators "shall follow and be bound by" Rule 3 of the American Arbitration Association (AAA) Supplementary Rules for Class Arbitration, Pet. App. 59a (¶7), which specifies that "the arbitrator[s] shall determine...whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." JA 56a (reproducing AAA Rule). Stolt reserved in the Supplemental Agreement various objections—including whether class members' damages would be decided in separate hearings, and the sequencing of merits discovery and class-certification discovery—but they made no objection to the arbitrators deciding whether class treatment was legally authorized. Pet. App. 59a-60a.

Stolt unequivocally told the arbitrators that the arbitrators, not the court, had the power to construe the contract. If there is a valid arbitration clause, they explained, then "it goes to the arbitrators, you guys read the contracts and you figure out the procedures

that apply, whether we contemplated having a class action or not." CAJA A1970. When they petitioned the district court to vacate the award, Stolt's brief again asserted that "when the parties have agreed to arbitrate all disputes, the arbitrator, not the courts, must construe the parties' arbitration agreement in the first instance to determine whether—applying the applicable contract law of construction—the parties intended to permit class-wide arbitration." CAJA A2130.

Even if Stolt had not expressly agreed to commit the clause construction decision to the arbitrators, the issue would have been assigned to them under *Bazzle*, which established that the question whether a generally worded arbitration clause permits class arbitration is a matter for arbitrators to decide in the first instance. 539 U.S. at 452-53 (plurality); *id.* at 454 (Stevens, J., concurring in the judgment and dissenting in part) (doubting need to remand where the state court decision was correct, but conceding that "[a]rguably the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court."). *Bazzle* correctly interpreted and applied this Court's prior FAA jurisprudence. "[P]rocedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (emphasis in original; quotations omitted). *Bazzle* relied on *Howsam* and distinguished *First Options*, because *Bazzle* involved not "whether they agreed to arbitrate a matter," which is normally for independent judicial resolution, but "what kind of arbitration proceeding the parties agreed to," which is

for arbitrators to decide. 539 U.S. at 452-53. In this case, as in *Bazzle*, all parties agreed to arbitrate, and the only issue is what procedures apply in the arbitration. In light of the FAA's strong "national policy favoring arbitration," *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), any doubts concerning the scope of arbitrable issues, including "the construction of the contract language itself," should be resolved in favor of arbitration. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25. There can be no doubt here that the arbitrators were empowered to construe the contract to determine whether it authorized class arbitration.

Stolt failed to raise and therefore waived any challenge to *Bazzle*'s allocation of the clause construction decision. *See* CAJA A1968 (arbitral hearing)("What Basel [sic: *Bazzle*] says is that the contract interpretation issue is left up to the arbitrator, that's the rule in Basel ... you [the arbitrators] decide, not the district court."); *id.* at 2266 (reply brief) (it "is not in dispute" that the arbitration panel decides whether the clause permits class proceedings); *see Stolt-Nielsen v. Animalfeeds*, Brief for Petitioners-Appellees, 06-cv-3474 (2d Cir.) at 9 n. 8, 46-47 (same).

Bazzle's allocation to arbitrators of decisional authority over the precise issue presented here has already proved workable and incurred substantial reliance. Following *Bazzle*, four circuits, including the court below, have held that it is for the arbitrator to determine whether a contract authorizes class arbitration,[4] and two more have relied on *Bazzle* to

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[4] *Vaughn v. Leeds, Morelli & Brown, P.C.*, 315 Fed. Appx. 327, 329 (2d Cir. 2009) (summary order, not reported); *Stolt-Nielsen SA v.*

assign to arbitrators similar issues, such as whether a clause permits consolidation.[5] There is no reason to reverse this workable and widely accepted rule. *See 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1478 (2009) (observing that "'[c]onsiderations of stare decisis have special force' over an issue of statutory interpretation"); *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202-203 (1991) (identifying reliance as an important factor weighing against overruling precedent).

Despite Stolt's commitment of the clause construction issue to the arbitrators, they nonetheless belatedly assert that the issue is "one for independent resolution by a court." Pet. Br. 19; *see also id.* at 18, 27-28, 29 (relying on *Bazzle* dissent). They cite *First Options* as providing the relevant analysis, *id.* at 19, notwithstanding that *Bazzle* correctly distinguished that case and specified that the question of class arbitration procedure is governed by *Howsam*'s allocation to the arbitrator. *Bazzle*, 539 U.S. at 452-53.

Animalfeeds Intern. Corp, 548 F.3d 85 (2d Cir. 2008); *Rollins v. Garrett*, 176 Fed. Appx. 968 (11th Cir. 2006)(per curiam); *Johnson v. Gruma Corp.*, 123 Fed. Appx. 786, 788 (9th Cir. 2005) (memorandum, not reported); *Pedcor Management Co., Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355, 358-59 (5th Cir. 2003).

[5] *Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*, 489 F.3d 580, 586 n.2 (3d Cir. 2007) (relying on *Bazzle* to allocate clause-construction question to arbitrator on motion for consolidated arbitration); *Kristian v. Comcast Corp.*, 446 F.3d 25, 40-41 (1st Cir. 2006) (relying on *Bazzle* to allocate to arbitrator other questions in class arbitration); *see also Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 577-581 (7th Cir. 2007) (relying on *Bazzle*'s reasoning, but not its precedential effect, to allocate consolidation question to arbitrator).

Stolt cannot, however, escape the consequences of its express submission of the issue to the arbitrators, the governing rule of *Bazzle*, and its own decisive waiver of any challenge to *Bazzle*. They have no claim to *de novo* judicial resolution of the question whether the parties' contract authorizes class arbitration.

B. The Arbitrators' Decision is Subject to Review Only to Determine Whether They "Exceeded Their Powers"

Stolt rests its challenge on FAA Section 10(a)(4), arguing that the arbitrators' construction of the arbitration clause "exceeded their powers." 9 U.S.C. §10(a)(4); Pet. Br. 16, 18, 23, 24. That provision does not support vacatur here. The arbitrators decided a question properly assigned to them, and their decision can be reversed only if Stolt shows that the arbitrators acted in excess of their authority, *i.e.*, decided an issue not within their power to decide. When parties have granted arbitrators the power to interpret the meaning of their contracts, which they undeniably did here, "it is the arbitrator's view of the facts and the meaning of the contract that they have agreed to accept." *United Paperworkers,* 484 U.S. at 38. The inquiry under § 10(a)(4) "focuses on whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue." *DiRussa v. Dean Witter Reynolds Inc.,* 121 F.3d 818, 824 (2d Cir. 1997).

Stolt also contends (Pet. Br. 24, 48) that the arbitrators acted in "manifest disregard of the law." This Court in *Hall Street Associates L.L.C. v Mattel,*

Inc., 128 S. Ct. 1396, 1402 (2008), recently held that FAA Section 10 provides the exclusive grounds for vacatur of an arbitration award, thus calling into question whether the non-textual "manifest disregard" standard is consistent with the FAA. The Court in *Hall St.* invalidated contracting parties' attempt to contract around the FAA's limited scope of judicial review in order to create an opportunity for *de novo* review of an arbitral award. If the "manifest disregard" standard properly survives *Hall St.* at all, it must be understood, not as a distinct ground for review from those provided in 9 U.S.C. §10(a), but as "a judicial gloss on the specific grounds for vacatur enumerated in section 10." Pet. App. 16a-17a.[6] In any event, the manifest disregard standard supports vacatur only "in the rare instances in which 'the arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it.'" Pet. App. 19a, *quoting Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 217 (2d Cir. 2002). On review for manifest disregard, "the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all, for only then were they exceeding the authority granted to them by the contract's arbitration clause." Pet. App. 18a, *quoting Wise v. Wachovia Sec.*

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[6] *See Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009) (rejecting manifest disregard as independent ground); *but see Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277 (9th Cir. 2009) (preserving manifest disregard standard); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. Appx. 415, 418-19 (6th Cir.2008) (preserving manifest disregard standard).

LLC, 450 F.3d 265, 269 (7th Cir.)(citations omitted), *cert. denied*, 127 S. Ct. 582 (2006). As we demonstrate below, under either the "exceeded their powers" or "manifest disregard" standard, the arbitrators' decision here cannot be vacated.

II. THERE IS NO GROUND FOR VACATUR HERE, WHERE THE ARBITRATORS USED ORDINARY METHODS OF CONTRACT INTERPRETATION, AS THE FAA REQUIRES, TO READ THE ARBITRATION CLAUSE TO PERMIT CLASS ARBITRATION

All parties agree that the arbitration clause is "silent," in the sense that it neither specifically authorizes nor specifically forbids class arbitration. In general, sweeping terms, the clause requires arbitration of "any dispute arising from the making, performance or termination" of the contract. It does not establish any arbitration procedures whatsoever, beyond explicit rules for selection of the arbitrators and general reference to "the provisions and procedure of the United States Arbitration Act." JA 30a. In the arbitration clause, the parties did not elect to address whether and how class arbitration would be permitted, and instead chose to delegate broadly the choice of arbitration rules to the arbitrators. In so doing, all parties undertook certain risks that the arbitrators would employ procedures that they might not like.

The fact that Stolt now is unhappy with the consequences of the arbitrators' decision is no reason for this Court to adopt the broad, new, preemptive federal rule Stolt advocates. Absent evidence that the

arbitrators "exceeded their powers," this Court should not allow Stolt to "walk away from its freely entered obligation," *Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 165 (3d Cir. 2000) (Alito, J., dissenting), which is to abide by the arbitrators' decision that class arbitration is permitted under the contract.

A. The FAA Evinces a Strong Policy in Favor of Arbitration That Supports Class Arbitration

This Court has recognized, and Stolt concedes, that class arbitration is permissible and feasible if it is contractually authorized by the parties' agreement. Stolt stresses that "[t]he point is not that class arbitration is necessarily unworkable, if all parties have actually agreed to it." Pet. Br. 33; *see also id.* at 13, 26, 41. Even the dissenters in *Bazzle* acknowledged that "the FAA does not prohibit parties from choosing to proceed on a classwide basis," 539 U.S. at 459 (Rehnquist, C.J., dissenting). The *Bazzle* majority's premise was that the arbitration could go forward on a class basis so long as the contract did not forbid it. *See id.* at 454 (plurality); *id.* at 454-55 (Stevens, J., concurring) (noting that nothing in the FAA precluded state court's holding that class-action arbitrations are permissible if arbitration clause allows them). The nonprofit American Arbitration Association (AAA), the world's largest provider of alternative dispute resolution services, also "understood *Bazzle* to endorse the proposition that, under the FAA, class arbitrations are permissible where the parties' arbitration agreement is construed to permit class arbitration." *Brief of American Arbitration Association as Amicus*

Curiae in Support of Neither Party (08-1198) [hereinafter AAA Br.] at 9.

The feasibility of class arbitration as a practical matter is amply confirmed by the successful administration of hundreds of class arbitrations before and after this Court's *Bazzle* decision. California has permitted class arbitration for decades, *see Keating v. Superior Court of Alameda County*, 645 P.2d 1192, 1209–10 (Cal. 1982), *rev'd on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984); *see also e.g., Blue Cross of California v. Superior Court of Los Angeles County*, 78 Cal. Rptr. 2d 779, 785 (Cal. Ct. App. 1998), *cert. denied*, 527 U.S. 1003 (1999); *Izzi v. Mesquite Country Club*, 231 Cal. Rptr. 315, 322 (Cal. Ct. App. 1986); *Lewis v. Prudential-Bache Securities, Inc.*, 225 Cal. Rptr. 69 (Cal. Ct. App. 1986); and class arbitration has been conducted elsewhere as well during the past twenty years, *see, e.g., Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991).

In the wake of *Bazzle*, various arbitration service providers developed class arbitration rules to provide guidance for the growing number of parties and arbitrators conducting class arbitrations. The AAA published its rules in 2003, and its website contains a readily accessible compendium of one large body of class arbitrations. *See*, http://www.adr.org/sp.asp?id=25562 (searchable class action docket, posting clause construction awards). Two of the other large arbitration service providers, JAMS, The Resolution Experts (formerly Judicial Arbitration and Mediation Services), and NAF (the National Arbitration Forum), have also promulgated class

arbitration rules. *See*, http://www.jamsadr.com/rules-class-action-procedures/ and http://www.adrforum.com/users/naf/resources/Arbitration%20class%20procedures%202007.pdf

The AAA alone reports administering 283 class arbitrations since it adopted its AAA Class Rules. AAA Br. at 22. That figure does not include cases administered by the many other dispute resolution providers, *ad hoc* cases like this one that were not filed with any institutional provider (even though, as here, they may have followed AAA rules), nor class arbitrations before the class rules were in effect. The AAA's experience confirms that class arbitration can be "a fair, balanced, and efficient means of resolving class disputes," AAA Br. at 25, and belies Stolt's complaints that such proceedings will be unjust to the parties against whom they proceed.

The lack of any FAA bar or presumption against class arbitration is consistent with the confidence the Act and this Court's FAA jurisprudence place in the ability of arbitrators to handle complex matters of broad consequence to the parties and the public. "Adaptability and access to expertise are hallmarks of arbitration." *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). The FAA entrusts arbitrators with complex, international antitrust cases affecting businesses all over the world and hundreds of thousands of people. *Id.* This Court has also held arbitration to be an appropriate forum for complex claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), the Securities Acts and employment discrimination laws; it has also held that arbitrators may fashion diverse and

nontraditional forms of relief, including treble or punitive damages and injunctive relief.[7] In sum, experience shows that class arbitration is compatible with the FAA, practicable, and that parties, neutrals and arbitration providers have developed and applied a successful regime of class arbitrations.

B. Under Applicable Contract Law, The Clause's General Grant of Authority to Arbitrate "Any Dispute" Includes Power to Use Class Procedures

The arbitrators' reliance on contract principles, rather than the special, explicit-statement rule that Stolt urges, is precisely what the FAA requires. The core purpose of the FAA is to codify a national policy favoring arbitration and placing agreements to arbitrate "on equal footing with all other contracts." *Hall St. Assocs.*, 128 S. Ct. at 1402. The FAA does not "purport[] to alter background principles of state contract law regarding the scope of agreements." *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1902 (2009). *See First Options*, 514 U.S. 938 (commercial arbitration agreements are enforced "like other

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[7] *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (holding punitive damages arbitrable); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (holding Age Discrimination in Employment Act claims arbitrable, and noting that arbitrators "do have the power to fashion equitable relief"); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (holding Securities Act of 1933 claims arbitrable); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (holding Securities Exchange Act of 1934 and RICO claims, and treble damages, arbitrable); *Mitsubishi*, 473 U.S. 614 (holding international antitrust claims arbitrable).

contracts"); *Volt Info. Sciences v. Board of Trustees,* 489 U.S. 468, 478 (stating that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, *like other contracts*, in accordance with their terms")(emphasis added). The decision of the arbitrators construing the parties' contract to permit class arbitration faithfully comports with the FAA.

There has been no definitive choice-of-law analysis for the contract construction dispute in this case, and, as the court of appeals correctly concluded, none is needed. The court of appeals determined that Stolt waived any choice-of-law objection when they insisted in their brief to the arbitrators that they "need not decide" between New York and federal maritime law, "because the analysis is the same under either." Pet. App. 21a, *quoting* Stolt-Nielsen's Arbitration Br. 7 n. 13, CAJA 604.

New York state law on reading broad clauses to permit class arbitration directly supports the arbitrators' decision. New York's intermediate appellate court recently sustained an arbitral decision to permit class arbitration under a clause that required arbitration of "all...disputes" arising under the contract. *Cheng v. Oxford Health Plans Inc.,* 846 N.Y.S.2d 16 (1st Dep't 2007) (per curiam).[8] The Second

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[8] New York and maritime law both allow consolidation of arbitrations. *See County of Sullivan v. Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 127 (1977) ("it is no longer open to serious dispute that there is judicial power to order consolidation of arbitration proceedings"). Schoenbaum's admiralty treatise explains that "judges in admiralty cases frequently adopt state law rules through a process of 'borrowing,' thereby incorporating them into

Circuit in this case permissibly relied, *inter alia*, on *Cheng*. Any decision by this Court to second-guess the state court and its corresponding federal court of appeals would be a break from established FAA law.

To the extent that maritime contract law applies, there is no distinctive, judicially established maritime rule. Federal courts sitting in admiralty typically follow state law rules of decision. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313 (1955) (applying state law in recognition that "not...every term in every maritime contract can only be controlled by some federally defined admiralty rule"); Thomas J. Schoenbaum, 1 ADMIRALTY AND MARITIME LAW § 4-2 (4th ed. 2004 & Supp. 2006) (observing that, "[a]lthough the federal judiciary has the power to announce new principles of general maritime law, this is done very infrequently and only when there is a compelling need to fashion new rules"). In the face of Stolt's waiver of choice-of-law objections and the absence of any distinctive maritime rule of law, the arbitrators applied common general principles of both maritime and New York contract law. Pet. App. 49a. Their conclusion comports with the principle, common to both, that a broad and general grant of authority to arbitrate without restriction against class proceedings includes authority to organize the proceedings on a class basis. "Whatever is necessary to

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the general maritime law." ADMIRALTY AND MARITIME LAW § 4-2. Using that process, the New York Court of Appeals in a maritime case followed New York law to allow consolidation of arbitration under maritime contract, because "the sole issue was procedural" so there was "no basis upon which to predicate a holding that Federal law controls." *Vigo S. S. Corp. v. Marship Corp. of Monrovia*, 26 N.Y.2d 157, 158 (1970).

be done in order to accomplish work specially contracted to be performed is part of the contract, though not specified." 17A Am. Jur. 2d Contracts § 398 (2009).

The contract itself imposes no explicit restrictions on the particular procedures the arbitrators may employ. It requires arbitration pursuant to the FAA, but does not incorporate any institutional arbitration provider's rules. It thereby reflects the parties' shared intent to delegate to the arbitrators broad power to employ appropriate procedures.

The contract's conferral on the arbitrators of power to decide "*any*" dispute is most reasonably read as not limited to the subset of disputes between a single parcel tanker owner and a single customer. The word "any" is commonly understood expansively. *See Randall v. Bailey*, 288 N.Y. 280, 285-286 (1942) (reading "any" broadly); *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 31-32 (2004) (interpreting "expansive contract language," referring to "any" person, to cover land as well as sea carriers); *Sacramento Nav. Co. v. Salz*, 273 U.S. 326, 331 (1927) (reading contract that broadly referred to "any vessel" to include a combination of barge and tug); *Ali v. Federal Bureau of Prisons*, 128 S. Ct. 831, 832 (2008) (noting that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'"), *quoting U.S. v. Gonzales*, 520 U.S. 1, 5 (1997), *quoting* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976).

So, too, the clause's use of the term "dispute" is permissibly read to include disputes involving multiple parties, as here. Sherman Act cases often must be brought as class actions, for reasons explained below, Point II.F., so a clause encompassing "any" Sherman Act dispute is plausibly understood to cover class cases. The term "dispute" readily and naturally denotes class proceedings; indeed, it was used by the Court in *Bazzle* in referring to the completed class arbitration under review in that case. 539 U.S. at 453 (referring to the arbitrator who "arbitrated the *Bazzle* dispute"). Similarly, Judge Posner's opinion approving consolidated arbitration in *Connecticut General Life Insurance Co. v. Sun Life Assurance Co. of Canada*, 210 F.3d 771, 774 (7th Cir. 2000), applies "usual methods of contract interpretation" to hold that agreements to arbitrate "any dispute" arising from the contract authorized consolidation of arbitration. *Id.* "As normally understood, the word 'dispute' ... does not exclude a dispute involving multiple parties." *Id.* at 775. In sum, the arbitrators reasonably and permissibly read the contract to reflect an agreement to grant the arbitrators discretion to proceed via class arbitration.

It is common for contracts to use broad terms to confer on arbitrators a range of powers not explicitly mentioned. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, for example, the arbitration clause contained no specific reference to punitive damages, but simply conferred on arbitrators the power to resolve "any controversy." 514 U.S. 52, 59 (1995). Using the very phrase which Stolt repeatedly invokes—that arbitration "is a matter of consent, not coercion," *id.* at 57, *see* Pet. Br. 13, 45, 46—this Court

asked whether the contracting parties had "agree[d] to *include* claims for punitive damages within the issues to be arbitrated," and determined that they had. *Mastrobuono,* 514 U.S. at 58 (emphasis in original). The Court so held even though "[t]he agreement contain[ed] no express reference to claims for punitive damages." *Id.* at 59. Indeed, the Court held that the contract's general empowerment of the arbitrator so clearly authorized the particular relief sought that it sufficed to override a common-law rule prohibiting arbitral awards of punitive damages. *Id.* at 58-59. That approach, recognizing arbitrators' powers not mentioned by name, is manifest throughout this Court's arbitration jurisprudence.[9] Stolt offers no good reason to adopt what is essentially the *opposite* approach when it comes to the issue of class arbitration.

Arbitrators' leeway to find authorization for specific action under general contract terms is even more firmly recognized where, as here, arbitration *procedures* are concerned. "[T]he court cannot mess in the arbitrators' procedures beyond the very limited extent permitted by sections 9 and 10 of the Federal Arbitration Act." *Conn. Gen. Life Ins. Co,* 210 F.3d at 774. Whether arbitration can go forward on a class basis is a question of procedure, as the Court correctly noted in *Bazzle*: There, as here, the relevant question was "what kind of arbitration proceeding the parties agreed to," a question that "concerns contract

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[9] *See, e.g., Mitsubishi,* 473 U.S. 627, 626 (reading arbitration agreement, like "any other contract," whereby a general arbitration clause not specifically mentioning statutory claims is read to include them).

interpretation and arbitration procedures." 539 U.S. at 452-453.[10]

There is no requirement under the FAA that parties specify all procedures in advance. The background rule in arbitration is that arbitration procedures, if not explicated, are delegated to the discretion of the arbitrators. "[P]rocedural questions which grow out of the dispute and bear on its final disposition are ... for an arbitrator[] to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *Volt*, 489 U.S. 468, 476 (1989) (arbitrators draw their authority from the arbitration agreement, and need not follow "a certain set of procedural rules").

There was no argument in *Bazzle* that the clause at issue specifically authorized class arbitration in the way that Stolt here argues is required. That clause was either silent or, as Green Tree argued, its language prohibited class arbitration. (Green Tree contended the clause's authorization of arbitration by "one arbitrator selected by us with consent of you" confined the clause to two-party arbitration and so implicitly prohibited class arbitration. *Bazzle*, 539 U.S. at 448). The Court's remand assumed that the arbitrator's certification of the class could be sustained if the clause were silent, but not if it affirmatively forbade arbitration; that was the issue on which the

[10] If the authority to proceed on a class basis were not a *procedural* matter, Federal Rule of Civil Procedure 23 would run afoul of the Rules Enabling Act, 28 U.S.C. § 2072. Class mechanisms comfortably qualify as procedure because they address the "process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Hanna v. Plumer*, 380 U.S. 460, 464 (1965).

Court required a ruling from the arbitrator. But if, as Stolt argues, a silent clause necessarily has the same consequences as one that affirmatively prohibits arbitration, there would have been no need to remand; the Court would simply have held that the class arbitration was impermissible.

Two more features of *Bazzle* underscore the permissibility of the arbitrators' decision here. The Court in *Bazzle* found that it was the clause's reference to "one arbitrator selected by us with consent of you" that created an ambiguity as to whether the clause forbade class arbitration, and therefore warranted a remand. 539 U.S. at 450-451. No similar language and no parallel ambiguity exists here. And, where *Bazzle* required a remand to the arbitrator to make sure that he acted independently and was not deferring to a prior judicial construction of the same clause, there was no prior judicial construction here that might have improperly swayed the arbitrators.

The contract's reference to "all disputes" is also similar to the clauses in scores of other cases in which arbitrators have applied the governing contract law of New York, Texas, Massachusetts, Michigan, or another jurisdiction to authorize class arbitration. *See, e.g., JSC Surgutneftegaz v. President and Fellows of Harvard College*, 2007 WL 3019234 at *2 (SDNY) (sustaining arbitrators' determination that, under New York contract law, "the plain language of the agreement" authorizing arbitration of "any...claim" permitted class arbitration), *confirming President and Fellows of Harvard College v. JSC Surgutneftegaz*, AAA Case No. 11 168 T 01654 04 (Aug. 1 2007); *Scher v. Oxford* AAA Case No. 11 139 00548 05, slip op. at 9-

10 (Mar. 7, 2006) (applying New York law to hold that clause requiring that "all disputes" be arbitrated encompassed class disputes), *conf'd, Cheng v. Oxford Health Plans Inc.*, 846 N.Y.S.2d 16 (1st Dep't 2007) (per curiam); *Rene Adame vs. Fleetwood Enterprises, Inc.*, AAA Case No. 1 1 181 01292 07, slip op. at 13, 9-10 (March 11, 2008) (applying Texas contract law to conclude that "class disputes are included within the plain meaning of the phrase 'any dispute or claim'"); *Tomeldon Company, Inc. vs. Medco Health Solutions, Inc.*, AAA Case No. 11 193 00546 06, slip op. at 13 (Nov. 22, 2006) (holding that, under New Jersey contract law, clause language permitting arbitration of "[a]ny controversy or claim," is "certainly broad enough to include a claim brought in a representative capacity and would, without more, encompass class arbitration."); *Dub Herring Ford, Inc. vs. Ford Dealer Computer Service*, AAA Case No. 11 181 01119 06, slip op. 8 (Nov. 12, 2006)(applying Michigan and Texas contract law to permit class arbitration under clause providing for arbitration of "all disputes" because "the plain and generally accepted meaning of 'all'" encompassed class disputes). These and many other, similar opinions are posted on line at: http://www.adr.org/sp.asp?id=25562 (AAA searchable class action docket).

In short, the arbitrators did not exceed their powers or manifestly disregard the law. Their decision follows both maritime and New York law, comports with this Court's FAA jurisprudence, and shares the common approach of a large and growing body of arbitral decisions construing general arbitration clauses to permit class-wide procedures.

C. There is No FAA-Based Presumption Against Class Arbitration

Stolt urges this Court to create a new, federal common-law default rule foreclosing class arbitration except when the parties' arbitration agreement specifically authorizes class proceedings by name. They seek to ground such a rule in the FAA by repeatedly invoking the FAA's and this Court's references to interpretation of arbitration contracts "in accordance with their terms," Pet. Br. 12, 13, 15, 16-17, 25, 26, 27, 31, 33, 41, 45, 48, as if that phrase calls for something more than contract interpretation according to ordinary principles of generally applicable contract law. They also purport to ground their rule in contract law, but invoke an invented version of contract doctrine at odds with both maritime and New York law. Stolt's references to the contracting parties' intent are consistently qualified by adjectives like "actual" or "real," suggesting a heightened, specific-intent requirement beyond the ordinary contract principles that govern the interpretation of contracts. See Pet. Br. 22, 26, 47, 48, 50, 51 (arguing that "actual agreement" was lacking); *id.* at 23-24, 37, 46 (no "actual consent"); *id.* at 45 (no "real contractual intent"); *id.* at 52 (contending respondent lacks "an actual contract theory"). In sum, Stolt deploys the terminology of this Court's FAA cases out of context, together with a novel and legally unsupported contract theory, to advocate a new rule whereby class arbitration would be permissible only where the contract specifically stated as much in unequivocal terms.

Such a sweeping, novel—and presumably broadly preemptive—federal rule of FAA contract interpretation finds no support in the FAA or this Court's decisions. There is no general federal common law of contract interpretation, *O'Melveny and Myers v. FDIC*, 512 U.S. 79, 83 (1994), and the FAA is not a mandate to create one. *Cf. Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). The point of the FAA Section 4 language requiring courts to enforce arbitration agreements "in accordance with the[ir] terms" is simply to place arbitration contracts on the same footing as other contracts, not to impose any especially stringent specificity requirement on FAA-governed agreements to arbitrate. A long line of FAA precedent makes clear that, by referring to enforcing contracts according to their terms, the Court simply means that arbitration agreements must be interpreted *in the same manner as any other contract*. *See* pages 30-31 *supra* (*citing Hall St., Arthur Andersen, Volt* and *First Options*).

The unprecedented nature of the rule Stolt advocates is underscored by the fact that they cite no body of contract law to the effect that every term must be made explicit in order for the contract to provide authority. Stolt points only to three federal court decisions, *Glencore, Ltd. v. Schnitzer Steel Products*, 189 F.3d 264 (2d Cir. 1999), *United Kingdom v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993), and *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), *see* Pet. Br. 46, 24, and argues that the arbitrators erred in declining to follow them. But to the extent that those courts demand specifically stated contractual authority for class arbitration, they misinterpret both contract law and the FAA. Judge Posner's reasoning

for the Seventh Circuit in *Connecticut General Life Insurance Co.*, 210 F.3d at 774, subsequent to *Champ*, applying "usual methods of contract interpretation" to read a contract's authorization to arbitrate "any disputes" to permit consolidation of arbitrations, is more persuasive and is consistent with this Court's FAA jurisprudence. *See* page 34, *supra*. Stolt's trilogy is also at odds with *Bazzle*. No remand to the arbitrator would have been necessary in *Bazzle* if the FAA required that the failure specifically to authorize class arbitration was an absolute bar.

Stolt's proposed rule of federal contract construction would *disfavor arbitration* by placing class proceedings off limits to arbitrators where courts are authorized to conduct them in similar cases. As this Court has emphasized, arbitration clauses are a species of forum-selection clauses. *See Scherk v. Alberto-Culver Co*, 417 U.S. 506, 519 (1974). If this had been a New York *judicial* forum-selection clause with the same "any disputes" language, there is no question that the New York court would be authorized to conduct a class action. Any doctrine requiring such language to be construed to disable *arbitrators* in parallel circumstances from using otherwise available procedures of that forum would run afoul of the FAA's pro-arbitration policy, because it singles out class arbitration for skepticism in violation of the most basic principle of FAA jurisprudence. *See Doctors' Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Perry v. Thomas*, 482 U.S. 483, 492, n. 9 (1987).

D. There is No Special Federal Maritime Rule Against Class Arbitration, Nor Reason to Create One

Stolt invokes the maritime context of this case as a rationale for construing the FAA to forbid class arbitration absent specific authorization. Pet. Br. 42-45. It distinguishes this case from consumer contracts of adhesion in particular. *Id.* at 49. More generally, Stolt suggests that the rule it seeks here might not apply to "a silent arbitration clause in a different type of contract, involving different types of parties." *Id.* at 51.

There is no precedent in maritime law for the new rule Stolt proposes. In the absence of any maritime precedent, Stolt was left to rely on expert testimony, which it contends shows "established maritime practice" (but no precedent) against class arbitration. *Id.* at 43; Pet. App. 49a, 51a-52a. The arbitrators duly considered that testimony; they did not "exceed their authority" in declining to fashion an entirely new rule based on it.

The experts testified that they had never heard of class arbitrations in the maritime context. Mere lack of experience, however, does not establish an industry custom. *See Austin Nichols & Co. v. The Isla de Panay*, 267 U.S. 260, 272 (1925) ("custom and usage," refers to trade usage "commonly known and acted upon"). At most, the testimony showed that there is no custom one way or the other with respect to whether broadly worded maritime contracts permit class arbitration.

Further, the matters the experts testified about did not require any special expertise beyond the arbitrators' own. This was not, for example, a contract interpretation question turning on maritime terminology requiring specialized expertise. *Cf. Crescent Oil and Shipping Svcs., Ltd. v. Philbro Energy, Inc.*, 929 F.2d 49 (2d Cir. 1991) (relying on maritime expertise to interpret contractual references to "discharge port" and "lighterage area"). Stolt's experts were not maritime industry participants, but arbitrators, professors, and lawyers—like the arbitration panelists themselves—speaking to the ultimate legal issue of contract interpretation. *See* JA 122a (Kimball); JA 136a-137a (Harris). The arbitrators' treatment of the testimony was not error, let alone the kind of extreme overstepping that requires vacatur under Section 10(a)(4).

This court should reject the invitation to fashion a special, anti-class rule for a subset of maritime arbitrations. Stolt's maritime law experts identified no rationale for interpreting the FAA differently in maritime arbitrations as compared to other categories of cases. The advantages that Stolt contends motivate resort to maritime arbitration are not specific to maritime law, but are features of international arbitration generally (such as avoiding national courts), and of domestic arbitration generally (such as choosing expert decision makers, tailoring procedures to the needs of the case, and resolving disputes more efficiently). JA 121a, 122a, 124a, 130a. Those advantages simply do not bear on whether the arbitrators permissibly construed the arbitration clause before them. The experts identified nothing unique about shipping that would warrant this Court

devising a special maritime doctrine here and imposing it on the arbitrators—implying that they somehow exceeded their powers by not developing it themselves.

E. Petitioners Advance no Reason to Conclude that Classwide Procedures are Beyond the Authority of the Arbitrators

The arbitrators acted well within their allocated authority. It would be especially difficult to establish that the arbitrators exceeded their powers in the circumstances of this case, where the only issue under review is the precise question that the parties expressly assigned to the arbitrators to decide: Did the clause permit class arbitration, or not? The arbitrators carefully applied the law to that issue. They rendered a written decision that is well reasoned and correct. They did not "exceed their powers," and therefore their decision cannot be vacated. *See supra* Point II.B.

Stolt contends that the court of appeals "refused to review the substance of the arbitrators' decision to determine whether they had 'exceeded their powers,'" because the court thought the issue was committed to the arbitrators "irrespective of whether [they] decided the issue correctly." Pet. Br. 24. In fact, the court of appeals accurately stated the implications of the "exceeding powers" standard, under which a merely incorrect contract interpretation must be sustained. *See supra* Point I.B. Ordinary legal error does not suffice. More fundamentally, Stolt is wrong that the court of appeals never reviewed the substance of the decision; the court explained in detail throughout its

opinion why it believed the arbitrators' contract construction was valid. *See* Pet. App. 21a-31a.

The heart of Stolt's plea for vacatur rests on their contention that "class arbitration fundamentally transforms the nature and scope of the proceeding," Pet. Br. 27, such that this Court should fashion a rule prohibiting class arbitration in the absence of a contract term specifically and expressly authorizing it. As explained above, Point II.C., the FAA supports no such rule. The balance of Stolt's brief makes a series of policy arguments that are unsupported by existing law. Even if this Court were poised to make new law, those points provide no ground for any such venture.

Stolt contends that, when a class is certified, the risk of an erroneous result is magnified, which "retroactively alters the core economics" of the arbitration contract. Pet. Br. 28. It must be noted that in this case, in light of Stolt's admissions of culpability and the criminal convictions of Odfjell and Jo Tankers, there is faint cause for concern about the "risk of an erroneous result," *id.*, holding petitioners liable. There is, in any event, nothing retroactive about such risk. Legally sophisticated parties, which petitioners profess to be, have long been on notice of the particular risk that arbitrators might construe a clause granting them powers over "any dispute" to encompass class proceedings. *See supra* page 28.

Stolt raises a series of subsidiary points in support of its claims that class arbitration alters the parties' bargain. First, Stolt claims that class proceedings are complex and unworkable. But Stolt acknowledges that class arbitration is not unworkable

if the parties have agreed to it, *see supra* page 27, and the arbitrators held that they did just that in this case. Arbitrators have been deemed equal to all kinds of complicated, multi-national, high-impact disputes. *See* Point II.A. There is no suggestion in the FAA or this Court's cases that they are not competent to administer class proceedings. To the contrary, the substantial positive experience of the AAA in administering class arbitrations dispels such concerns. *Id.* Moreover, class arbitration is not "complex, litigious and slow," Pet. Br. 31, when compared with myriad individual arbitrations, or no feasible process at all. To the contrary, class arbitration captures efficiencies that often make the difference between fair recovery and none.

Second, Stolt argues that class arbitration "denies defendants their core right to select different arbitrators to resolve disputes with different members of the would-be class." Pet. Br. 35. That argument is circular. The characterization of class arbitration at the hands of a rogue arbitrator "stripping from all unconsenting parties their foundational right" to select their arbitrators, *id.*, assumes what it purports to prove: that the contract forecloses class arbitration. The arbitral panel here permissibly concluded otherwise. By the time parties select arbitrators, they generally know that claimants are seeking to proceed as a class, and they select suitable arbitrators with special competence in class, mass, or complex cases, as they did here. Stolt complains of the "asymmetry" that class members, but not the petitioning ship owners, will have the right to opt out, *id.* at 23, but Stolt was involved in selecting these arbitrators, whereas the putative class members were not.

Third, Stolt contends that the need for judicial oversight confirms that class arbitration is improper absent "actual consent." *Id.* at 37. It is true that due process may require judicial review to ensure that arbitrators do not disregard the rights of absent class members. But since the older decisions to which Stolt refers, *see, e.g.*, Pet. Br. 37, *citing Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991), experience has shown that tasks like class certification can be accomplished by arbitrators as well as courts. And, under the FAA, arbitral awards are subject to judicial review at least where, unlike here, they are sufficiently final. *See infra* Point III.

Fourth, the concern that class arbitration cannot be "meaningfully confidential" (Pet. Br. 38) is belied by the kinds of precautions taken in this case, where documents reflecting proprietary information were filed confidentially. *See* A2339; CAJA A1-A181 (confidential appendix). Class arbitration does require some public disclosure, at least to give potential class members notice and an opportunity to opt out. Parties to class arbitration accordingly cannot be assured confidentiality as to the existence of a dispute and certain basic aspects of it. There is, however, no default requirement of absolute confidentiality in the FAA or in this Court's cases interpreting it, nor any reason to think that adequate confidentiality terms cannot be devised to protect important business and other information in class arbitration.

Stolt's fifth argument is that class arbitration cannot provide finality and repose. Pet. Br. 39-41. That is not the case. Once class members have

received notice and declined to opt out of a class arbitration, they are validly subject to the decision of the arbitrators. There is no reason to believe that a final award in such a matter would have any less binding effect on the absent class members than any arbitral award has on parties to it. *See, e.g., EEOC v. Waffle House,* 534 U.S. 279, 280-81 (2002)(noting that "ordinary principles of res judicata . . . may apply" to prevent the EEOC from obtaining victim-specific relief in court for an employee who already obtained relief through arbitration); Fed. R. Civ. P. 8(c) (specifying "arbitration and award" as an affirmative defense for pleading purposes).

Stolt also argues that, based on "the international resistance to class actions," foreign jurisdictions might decline to recognize a United States class arbitration award under the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, art. V(1), 21 U.S.T. 2517 (June 10, 1958) ("New York Convention"). To the extent that foreign resistance exists, it is irrelevant to interpretation of the FAA. Other nations similarly lack our practice of awarding punitive damages in arbitration, for example, but those remedies are nonetheless authorized under *Mastrobuono*, 510 U.S. 52.

Moreover, international comity is strong under the New York Convention and enforcement rates are extremely high. Stolt points to no instance of non-enforcement of a class award under the New York Convention. The provisions for non-recognition that Stolt identifies, *see* Pet. Br. 41, are extremely narrow; "public policy" in art. Section V(2)(b), for example,

refers to the host state's international public policy, not a mere incompatibility with the host country's own laws or policy preferences. Moreover, Stolt does not support its premise of foreign hostility to class mechanisms. Class or other representative actions and arbitrations are, in fact, increasingly brought outside of the United States; they "are an acceptable form of arbitration under the New York Convention . . . deserving of the same treatment given to other types of arbitration." *See* S. I. Strong, *The Sounds Of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration In Cases Of Contractual Silence Or Ambiguity?* 30 Mich. J. Int'l L. 1017, 1024 (2009).[11]

F. The Arbitrators' Construction Best Serves the Public Interest

The fact that the public interest is well served by the arbitrators' interpretation of the contract further militates against Stolt's approach. "In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred." RESTATEMENT (SECOND) OF CONTRACTS, § 207 (Interpretation Favoring the Public). Stolt's proposed default rule—

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[11] If petitioners are concerned that an overseas class member might seek to litigate in a foreign court even after a final award was entered in this case, and that a foreign court might refuse to recognize the res judicata effect of the award, the arbitrators suggested they might consider an opt-in mechanism that would reinforce preclusion with an individualized, affirmative expression of intent to be bound by the result. *See* Pet. App. 52a. That may be unnecessary, but in any event, those concerns are premature in light of the motions pending before the arbitrators to limit the international reach of the class.

that arbitrators lack power to conduct class arbitration unless the contract explicitly authorizes class arbitration by name—would interfere with effective vindication of the Sherman Act, and would therefore be contrary to the public interest.

This Court has long recognized that antitrust enforcement in the United States relies to a significant extent on private litigation to check anticompetitive misconduct. *See California v. Am. Stores Co.*, 495 U.S. 271, 284-85 (1990); *Mitsubishi*, 473 U.S. at 634-35. The costs of private antitrust enforcement, however, are substantial. In such cases, expert fees alone typically run into the hundreds of thousands of dollars, and the cost of attorney time to litigate is also high. There has not been any opportunity to develop a record in this case regarding the likely costs of litigating it on an individual basis,[12] but evidence in other antitrust cases is instructive. *See, generally In re American Express Antitrust Merchants' Litigation*, 554 F.3d 300, 316 (2d Cir. 2009), *cert. pending sub nom. American Express v. Italian Colors Rest.*, No. 08-1473 (filed May 29, 2009) (evidence that experts' fees in individual antitrust cases range from $300,000 to more than $2 million); *Kristian v. Comcast Corp.*, 446 F.3d 25, 58 (1st Cir. 2006) (witness fees likely to cost $300,000-$600,000 and attorney time likely to cost several million dollars). For all but the largest individual claims, the economic viability of litigating complex, international antitrust claims depends on class procedures. Class actions have accordingly long been a central component of antitrust remediation and

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[12] If this Court were to reverse, Animalfeeds would be entitled to an opportunity to develop such a record. *Cf. Green Tree Financial Corp–Alabama v. Randolph*, 531 U.S. 79 (2000).

deterrence. *See Reiter v. Sonotone*, 442 U.S. 330, 334, 344 (1979).

The distinctive features of arbitration intensify the under-enforcement problem that would arise were class procedures unavailable. Because of the nonpublic nature of individual arbitrations and their lack of precedential effect, claimants confined to arbitration and restricted to proceeding individually would be unable to rely on collateral estoppel, *see Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979), to streamline the aggregate proof burdens.

Without the opportunity to proceed on a class basis, most victims will rationally conclude that the expected reward of an individual suit would not justify the cost of proof. Thus, non-enforcement, rather than individual enforcement, would be the likely result of adopting Stolt's proposed rule presumptively barring class arbitration. Despite its promise to the Department of Justice to provide restitution, *see* page 5 *supra*, Stolt is well aware that, if class arbitration were unavailable, few individual claimants would be able to arbitrate, and petitioners would have to pay only a tiny fraction of the relief due to those they wronged. That reality lends additional support to the arbitrators' reading of the contract, consistent with public policy, to permit class arbitration.

III. JUDICIAL INTERVENTION HERE IS PREMATURE

As a threshold matter, the Court should dismiss this case as nonjusticiable, because the issue presented

is not ripe for review.[13] The question presented here relates to an interim, procedural decision that Stolt challenged in the district court even before the arbitrators had applied their ruling to the facts of this case. The arbitrators decided only that class procedures were not prohibited by the contract; they have not yet addressed whether this case is appropriate for class-wide resolution, and have not even considered class certification. It is entirely possible that the arbitral panel will find the facts of this case inappropriate for class treatment. Thus, review at this preliminary stage could produce an advisory opinion that might be wholly unnecessary.

The lack of ripeness here has both a constitutional Article III aspect, based on the lack of hardship to Stolt from denying immediate review, *see Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), and a prudential aspect, *see Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972), based on FAA policy favoring arbitration and avoiding interlocutory vacatur petitions on incomplete records in ongoing arbitration processes. The ripeness doctrine prevents interlocutory petitions to district courts "every time the arbitrator sneezes," *Dealer Computer Services v. Dub Herring Ford*, 547 F.3d 558, 563 (6th Cir 2008), just as it

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[13] Lack of ripeness cannot be waived, even though it was not raised below. *Nat'l Park Hospitality Assn. v. Dept. of Interior*, 538 U.S. 803, 808 (2003) (issue may be raised on court's own motion); *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57, n. 18 (1993) (same). Petitioners disparage the ripeness concern as prudential and therefore waived, Pet. Cert. Reply at 8-9, but, as they acknowledge, "even in a case raising prudential concerns, the question of ripeness may be considered on a court's own motion." *Nat'l Park Hospitality Assn.*, 538 U.S. at 808.

generally precludes judicial review of non-final agency action.

A. Under ripeness principles as applied to arbitration, judicial review is not appropriate until arbitrators have completed their work and their decision has caused a legally cognizable, concrete and non-speculative harm to would-be challengers. *See generally, Nat'l Park Hospitality Assn. v. Dept. of Interior*, 538 U.S. 803, 808 (2003) (holding that ripeness turns on "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration"). Stolt complains that, in the absence of immediate judicial review, it will have to submit to further arbitration proceedings regarding the propriety of class certification. Pet. Cert. Reply at 9. But this Court "has not considered . . . litigation cost saving sufficient by itself to justify review in a case that would otherwise be unripe." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 734 (1998). In the analogous context of the collateral-order doctrine—whose purpose of protecting trial proceedings from premature disruption by piecemeal appeals is analogous to the need to protect the integrity of the ongoing arbitral process (*see Green Tree Financial Corp–Alabama v. Randolph*, 531 U.S. 79, 86 (2000))—the anticipated burdens of litigation are likewise not sufficient to warrant appellate review before final judgment. *See Will v. Hallock*, 546 U.S. 345, 346 (2006) (stating that litigation burden may be cognizable harm under the collateral order doctrine only when going forward "would imperil a substantial public interest"); *Federal Trade Comm'n v. Standard Oil Co. of Calif.*, 449 U.S. 232, 242-243 (1980) (determining that even "substantial" burden of

defending litigation was inadequate to support interlocutory review); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994). The anticipated harm of proceeding in arbitration to the class certification determination does not make Stolt's question constitutionally ripe for review.

The arbitrators held only that the clause authorizes class proceedings as a general matter. The arbitration panel was "not called upon to decide, nor [did] it decide, whether the arbitration [would] proceed as a class arbitration." Pet. App. 48a-49a. No determination has yet been made whether this case fulfills the class arbitration requirements in AAA Class Rule 4, including numerosity of claimants whose claims raise common issues of fact or law, the typicality of Animalfeeds' claims of those of the putative class, Animalfeeds and counsel's adequacy as class representatives, the similarity of putative class members' arbitration clauses, and the demanding requirement of superiority of the class mechanism to the available alternatives. It thus remains entirely speculative whether the dispute will, in fact, proceed on a class basis.[14] The "basic rationale" of Article III's ripeness requirement is to prevent courts from prematurely "entangling themselves in abstract disagreements." *Abbott Labs.*, 387 U.S. at 148.

This Court has never before reviewed an arbitrators' decision as preliminary as this one.

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[14] There is also no arbitral decision on the scope of any class they might certify, nor on petitioners' pending motion seeking to limit the international reach of the class, *see supra* page 49 n.11, which could bear on some of petitioners' arguments here, such as their concerns about foreign enforcement. Pet. Br. 40-41.

Compare, e.g., *Bazzle*, 539 U.S. at 449-50 (reviewing contractual authorization for class arbitration *after* completion of class arbitration on its merits); *First Options*, 514 U.S. 938 (reviewing claims by non-signatories to arbitration agreement that agreement did not apply to them only *after* the arbitrator had decided the claims on the merits); *Mastrobuono*, 514 U.S. 52 (rejecting challenge that contract did not authorize punitive damages only *after* arbitration panel had decided dispute and awarded such damages); *with PacifiCare Health Sys. v. Book*, 538 U.S. 401, 407 (2003) (finding unripe a claim, not yet determined by the arbitrator, that a contractual bar against punitive damages would unlawfully foreclose treble damages under RICO Act); *Vimar Seguros y Reaseguros, S.A., v. M/V Sky Reefer* 515 U.S. 528, 541 (1995) (rejecting petition to stay pending Japanese arbitration based on "mere speculation" as to arbitrators' future decisions). Deeming the petition here to be ripe would be akin to permitting appellate interlocutory review of a district court's preliminary finding that Rule 23(a) had been satisfied, before the court even considered whether to certify any class under Rule 23(b). The Court should not allow this case to initiate a new and unprecedented level of judicial involvement in arbitration.

B. As a prudential matter, too, this case is premature. If the Court were to decide the question presented at this preliminary stage of the arbitration proceedings, before any class has been certified, much less any final award reached, it would invite multiple, interlocutory petitions for judicial review of interim decisions by arbitrators on any number of preliminary

procedural matters.[15] Such early and frequent judicial second-guessing would effectively re-create the very problem the FAA was enacted to address: a widespread pattern of judicial unwillingness to cede decisional authority to arbitrators chosen by parties to resolve their disputes.

The FAA contains no provision authorizing or even contemplating vacatur of preliminary procedural rulings within the arbitration. The fundamental premise of the FAA is that arbitration provides a simplified and streamlined process for dispute resolution, with limited judicial interference. Once a case is sent to arbitration, typically it should not be taken up again by a court until a final award on the merits has been entered. *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 413 (2d Cir. 1980). As this Court recently reemphasized, the FAA "substantiat[ed] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Hall St.* 128 S. Ct. at 1405. The same reasoning applies, not only to the *degree* of scrutiny considered in *Hall St.*, but also with respect to the *timing and frequency* of review. The Congress that adopted the FAA rejected an alternative model, under which arbitrators would "submit any question of law arising during arbitration to judicial determination." *Id.* at 1406 n.7.

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[15] The fact that the arbitrators' clause construction decision is denominated "a partial final clause construction *award*" as a term of art is not determinative. The underlying substance, not the label the arbitrators or the parties apply, is what bears on timeliness. *Publicis Comme'n v. True North Comme'ns, Inc.*, 206 F.3d 725, 728-29 (7th Cir. 2000).

Indeed, it is questionable whether even an arbitral class certification decision, if it had been made, would properly be ripe for review on an immediate vacatur petition to the district court. *See Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 282-83 (2d Cir. 1986) (allowing interlocutory petition to vacate a "partial final award" sustaining the respondent's counterclaim because it "finally and conclusively disposed of a separate and independent claim"); *id.* at 285 (Feinberg, J., dissenting) ("the function of arbitration should make considerations of finality even more compelling in arbitration than they are in conventional litigation"); *cf. Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) (holding district court decision on class certification not appealable until final judgment on the merits in the district court). Only since the recent adoption of Federal Rule of Civil Procedure 23(f) have litigants (as distinct from arbitrating parties) disappointed with trial court decisions on class certification motions had the opportunity, discretionary with the courts of appeals, for immediate review. Before promulgation of Rule 23(f) (for which there is no analogue under the FAA), this Court held parties to the burden of litigating their cases to conclusion before obtaining review of the disputed class question. It did so in order to avoid the "apparent and serious" "potential for multiple appeals in every complex case." *Coopers & Lybrand*, 437 U.S. at 474. That rationale applies here, too, where the FAA's statutory policy protecting the continuity and integrity of arbitral proceedings is at least as strong as the policy against piecemeal review of decisions rendered in the first instance by federal district courts.

Accepting review of Stolt's interlocutory petition here implicitly creates a troubling anomaly: an arbitration regime with *more* frequent and cumbersome review by courts than is currently permitted in litigation. If this Court rules on Stolt's claim in its current posture, every arbitration sought to be pursued on a class basis will involve, first, a petition for vacatur of the clause construction decision, and then a petition for vacatur of the certification decision (both without the threshold control that Rule 23(f) vests in the discretion of the reviewing court). Further, whereas a Rule 23(f) appeal involves only a single stage of judicial review, a vacatur petition from arbitration first goes to the district court and only then to the court of appeals. Allowing such piecemeal and interlocutory judicial review would routinely double the delay and expense of resolving each of the issues subject to review.[16] *Cf. Johnson v. Jones*, 515 U.S. 304, 315-317 (1995) (declining to approve a new category of interlocutory qualified-immunity appeals). Such a regime cannot be squared with the FAA's pro-arbitration policy.

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[16] In this regard, the one aspect of its successful regime of class arbitration that the AAA identified as due for revision (AAA Br. 16-17) is the provision in AAA Class Rule 3 for an automatic stay following the arbitrators' clause construction decision. *See* JA 56a-57a. Consistent with concerns expressed herein, the unnecessary delays caused by that provision have garnered criticism. The AAA reports that it will consider revising its rules to eliminate the stays. AAA Br. 16-17 & n.10.

CONCLUSION

This Court should vacate the decision below and remand with directions to dismiss the vacatur petition as unripe. In the alternative, the decision of the court of appeals should be affirmed.

Dated: October 20, 2009

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REPLY BRIEF

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IN THE

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STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

No. 08-1198

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

This Court granted certiorari to decide "[w]hether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act" (FAA). Pet. i. At the beginning and end of its brief, Animalfeeds repeats arguments it made at the petition stage for why the Court should not reach that question. Resp. Br. 19-26, 51-59. In between, it argues principally that, even if the parties never reached any actual agreement concerning

class arbitration, the decision to impose it is committed to the arbitrators—as a matter of FAA policy, through interpretation of the original contract, as a routine procedural decision, or because arbitrators are authorized to fill contractual gaps in accordance with their own views of appropriate public policy. *Id.* at 26-51.

None of these arguments provides a sound basis for resolving this case. The parties' supplemental agreement—Animalfeeds' first ground for avoiding review—committed to the arbitrators the question that the plurality in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), concluded should be resolved by arbitration: whether the parties' arbitration clause was silent as to class arbitration or, instead, revealed an agreement by the parties to prohibit or permit it. In this case, the arbitrators resolved that question by finding the agreement to be silent. Only then did the case present the separate statutory issue whether the FAA permits arbitrators to impose class arbitration in the absence of actual agreement. That is the question presented to this Court.

Animalfeeds' arguments on the merits fare no better. To begin with, they rest largely (as did the Second Circuit's decision) on the false premise that *Bazzle* held that the FAA permits arbitrators to impose class arbitration unless the parties expressly prohibit it. That is not correct. The *Bazzle* plurality expressly declined to answer the statutory question presented there—and again here. *See* 539 U.S. at 447, 450 (plurality opinion).

Animalfeeds also seeks to invoke policies underlying the FAA. The foremost such policy, however, is that arbitration is a matter of consent, not coercion. That is why the arbitrators' ruling—which turned on what background rule the arbitrators thought desirable

as a matter of policy, rather than on any finding about the parties' intent—cannot stand. Animalfeeds' arguments based on the text of the arbitration agreement come far too late and are, in any event, unpersuasive. Its attempt to characterize the availability of class arbitration as merely a procedural matter, committed to arbitral discretion, is likewise unavailing. As petitioners have explained, a switch from bilateral to class arbitration is enormously consequential, and may be authorized only by actual agreement of the parties. Lastly, the contention that class arbitration may be imposed here because it is more efficient or "as a matter of public policy" (CAJA A308-A309) fails. Bilateral arbitration in this case would not frustrate any public policy, and in any event, as this Court has repeatedly observed, neither efficiency nor policy considerations can trump the principle that arbitration may proceed only to the extent and in a manner to which the parties have consented.

Animalfeeds' final claim is that the case is unripe. That belated contention is both waived and meritless—as the Court evidently recognized in rejecting it at the petition stage.

ARGUMENT

I. ANIMALFEEDS' ATTEMPTS TO AVOID THE QUESTION PRESENTED SHOULD BE REJECTED

In its brief opposing certiorari, Animalfeeds argued prominently that the parties' supplemental agreement (Pet. App. 55a-63a) committed the question presented to the arbitrators, *see* Br. in Opp. 2, 6 & n.1, 11 n.5, and that the narrow standard of review applicable to most arbitral decisions rendered further consideration pointless, *id.* at 5, 6-10. "In granting certiorari," this Court "necessarily considered and rejected th[ose] conten-

tion[s] as a basis for denying review." *United States* v. *Williams*, 504 U.S. 36, 40 (1992). Undeterred, Animalfeeds repeats essentially the same arguments in its brief on the merits. Resp. Br. 19-26. Now that review has been granted, these arguments provide even less basis for failing to reach and decide the question presented. *Williams*, 504 U.S. at 40. Nonetheless, petitioners respond briefly before turning to the merits.

A. The Parties' Supplemental Agreement Did Not Commit To The Arbitrators The Question Whether They Were Authorized To Impose Class Arbitration On The Basis Of A Contract They Found To Be Silent On That Issue

The parties' post-dispute supplemental agreement did not commit to the arbitrators the question presented here—*i.e.*, whether the FAA permits arbitrators to impose class arbitration on the parties when their arbitration agreement is silent on that issue. On the contrary, the supplemental agreement specifically states that it does not "alter the scope of the Parties' [original] arbitration agreements," and that "[n]either the fact of this Agreement nor any of its terms may be used to support or oppose any argument in favor of a class action arbitration[.]" Pet. App. 62a.

The parties entered into the supplemental agreement in an effort to conform their arbitration proceedings to the plurality opinion in *Bazzle*.[1] The Court

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[1] The supplemental agreement provides that the arbitrators "shall follow and be bound by Rules 3 through 7 of the American Arbitration Association's Supplementary Rules for Class Arbitrations." Pet. App. 59a ¶ 7. As the AAA's amicus brief explains (at 2), those rules were adopted "[i]n response to this Court's decision in ... *Bazzle*."

granted review in that case to address the same statutory question presented here. *See* 539 U.S. at 447 (plurality opinion). It did not reach that question because a plurality concluded that there was an antecedent question of contract interpretation that had to be resolved in arbitration: whether the arbitration clause at issue was really "silent" as to class arbitration, or whether in fact the parties had agreed to forbid it. *Id.* at 447, 453. The plurality "remand[ed] the case so that the arbitrator may decide the *question of contract interpretation*—thereby enforcing the parties' arbitration agreements according to their terms." *Id.* at 454 (emphasis added); *see also id.* at 455 (Stevens, J., concurring in the judgment and dissenting in part).

Here, in light of *Bazzle*, the parties agreed that the arbitrators should first construe the parties' arbitration clause. In that regard, petitioners argued before the arbitrators that the clause was properly read, in light of uniform maritime industry custom and practice, to embody an understanding that any arbitration would be bilateral, not consolidated or class arbitration. *See* JA118a ("You have to look at the intent of the parties at the time. And certainly we show the intent of the parties was not to allow a class action arbitration.").[2]

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[2] *See also, e.g.*, JA91a-92a ("The issue ... [is] how our clients read the contract. And so you need to put yourself in their context. ... We're talking about recognizing how the industry works, how the parties do business. The fact that they negotiate these contracts with each other, have done that over generations, that they arbitrate all their disputes in an individual arbitration, that they always have done that, that's what they provide for, it's what they expect. They don't allow consolidation, they certainly don't allow class action[s]. ... That's certainly not what any of these parties anticipate[s]."); 109a-115a (expert testimony going to inferring

The arbitrators rejected that intent-based argument. Pet. App. 49a-52a. Petitioners disagree with the arbitrators' conclusion, but the question presented here takes it as established that the parties' arbitration agreement is "silent" as to class arbitration—*i.e.*, that the parties reached no actual agreement to prohibit or permit it. Indeed, it was only after the arbitrators resolved the contractual question by finding the agreement to be silent, but nonetheless asserted the authority to impose class arbitration, that this case presented the separate statutory question left open in *Bazzle*: whether the FAA permits arbitrators to impose (or courts to compel) a class arbitration to which the parties never actually agreed. That is the question now presented, once again, for resolution by the Court.

B. The Question Presented Is Subject To Meaningful Review

Animalfeeds likewise conflates the contractual and statutory questions in contending (Br. 24-26) that the FAA leaves no discernible room for this Court to review the Second Circuit's decision that petitioners' agreements with Animalfeeds, though silent, are an adequate basis for compelling class arbitration. The parties certainly authorized the arbitrators to determine whether the parties intended to permit or prohibit class arbitration. But in further deciding that, under the FAA, a silent agreement allowed them to order class arbitration, the arbitrators "exceeded their powers," 9 U.S.C. § 10(a)(4), or acted in manifest disregard of the law, by incorrectly resolving a question the par-

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parties' contractual intent from industry custom and practice); 119a-141a (expert declarations).

ties did not commit to them for final resolution. And in reinstating the arbitrators' award, the court of appeals in effect compelled petitioners—based on a misreading both of *Bazzle* and of the parties' supplemental agreement (*see* Pet. Br. 9-11)—to submit to an arbitration that is manifestly *not* "in accordance with the terms of the[ir] agreement[s]," 9 U.S.C. § 4. As petitioners have argued (Br. 23-25), those errors must be subject to review. Animalfeeds' contrary position would instead leave the legal consequences of silence in a contract governed by the FAA to the unbridled discretion of arbitrators, who could unreviewably "construe" a silent contract to permit class arbitration in any given case. This Court should reject that invitation to abdicate the limited but critical role of courts under the FAA, a role that includes ensuring nationally uniform application of the statute.

II. Under The FAA, Arbitrators And Courts May Not Compel Participation In A Class Arbitration To Which A Party Never Consented

Apart from trying to avoid review, Animalfeeds argues (Br. 26-51) that if parties agreed to arbitrate but never reached any agreement about class arbitration, the decision whether to impose it is committed to the arbitrators. Animalfeeds advances arguments based on FAA policy (Br. 27-30, 39-41) and, more prominently, on interpretation of the original contract (Br. 30-38, 42-51), including contending that the text of the contract supports class arbitration (Br. 31-34); that the decision to impose class arbitration is a merely procedural one understood to be delegated to the arbitrators (*e.g.*, Br. 35-36); and that arbitrators are authorized to fill contractual gaps in accordance with their own views of appropriate public policy (*e.g.*, Br. 49-51). None of these

arguments can justify the imposition of class arbitration in this case.

A. The FAA Principle Relevant Here Is That Arbitration Is A Matter Of Consent

Animalfeeds argues that the FAA permits arbitrators to impose class arbitration on the basis of a contract that is silent on the point because (i) class arbitration is feasible (Br. 27-30) and (ii) the FAA should not disfavor it (Br. 22, 39-41). To begin with, petitioners' position does not disfavor arbitration. Whether or not petitioners prevail, their disputes with Animalfeeds and others are committed to arbitration. Indeed, it was petitioners who successfully sought to enforce the underlying arbitration agreements. Petitioners contend only that the arbitration should not proceed in a manner to which the parties never agreed.

That approach is consistent with the FAA's "central purpose," which is not to favor or disfavor particular methods of arbitration but to "ensure that private agreements to arbitrate are enforced according to their terms." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (internal quotation marks omitted). The guiding principle relevant here is thus that arbitration "is a matter of consent, not coercion." *Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). Here, the parties' arbitration agreement is "silent" as to class arbitration—*i.e.*, petitioners never consented to it. And petitioners' fundamental submission is that the transformation from bilateral to class arbitration is too consequential to be made in the absence of actual consent.

Animalfeeds responds to this central point in part by accusing petitioners of seeking a "rule of extraordi-

nary specificity" that "requires specifically expressed contractual authorization of class arbitration." Resp. Br. 2; *see also id.* at 16 (contract must "specifically mention[] class proceedings with approval"), 30 ("special, explicit-statement rule"), 36 ("specifically authorize[s] class arbitration"), 39 ("specifically authorizes class proceedings by name"), 45 ("specifically and expressly authorizing"). Tellingly, Animalfeeds offers no citation to petitioners' brief to support this allegation. As petitioners have made clear (*e.g.*, Pet. Br. 49), consent to class arbitration may be manifested either in the text of the parties' agreement or in other circumstances from which actual intent to authorize class proceedings may properly be inferred.

Those circumstances include, for example, the sort of industry custom and practice that petitioners demonstrated to the arbitrators and the district court—which in this case, of course, would have justified a conclusion that the parties intended to *prohibit* class arbitration. *See, e.g.*, CAJA A599; JA126a ¶ 21; JA139a ¶ 24; Pet. App. 42a, 51a. They would also include background rules of the law selected by the parties to govern their agreement and known to the parties at the time of contracting, such as a default rule that parties will be deemed to have consented to class arbitration unless they expressly prohibit it. *See, e.g.*, Pet. Br. 49-50. Thus, for example, an arbitration agreement governed by South Carolina law and signed after the state supreme court adopted such a default rule in *Bazzle* v. *Green Tree Financial Corp.*, 569 S.E.2d 349 (S.C. 2002), might well support an inference that parties whose arbitration clause is textually silent on the issue nonetheless actually contemplated the possibility of class pro-

ceedings.[3] There is, accordingly, no basis for Animalfeeds' suggestion (Br. 2-3, 40) that petitioners' position would broadly displace ordinary principles of state contract law directed toward ascertaining and enforcing parties' contractual intent.

The FAA does require, however, that any imposition of class arbitration be based on *actual* intent to permit it—a point petitioners have stressed, as Animalfeeds observes (Br. 39). That rule is consistent with this Court's precedents and with standard principles of contract law. *See, e.g., Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("[A]s with any other contract, the parties' intentions control."); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 34 (1991) ("The arbitrator's task is to effectuate the intent of the parties and he or she does not have the general authority to invoke public laws that conflict with the bargain between the parties." (internal quotation marks omitted)); *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995) (relevant contract law would require court to see whether parties "objectively revealed an intent" on issue of arbitrability); *Mastrobuono*, 514 U.S. at 61 (looking to parties' incorporation of specific body of arbitral rules to determine whether parties intended to authorize arbitrators to impose pu-

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[3] Although Animalfeeds suggests to the contrary (Br. 13, 31-32), New York law provides no such rule that might have justified the arbitrators' decision in this case. Even the Second Circuit—citing the same cases as Animalfeeds—recognized this point: "[N]o state-law rule of construction clearly governs the question of whether class arbitration is permitted by an arbitration clause that is silent on the subject[.]" Pet. App. 27a (citing *Evans* v. *Famous Music Corp.*, 807 N.E.2d 869 (N.Y. 2004), and *Cheng* v. *Oxford Health Plans, Inc.*, 846 N.Y.S.2d 16 (App. Div. 2007) (per curiam)).

nitive damages).[4] In contrast, Animalfeeds' proposed rule that class arbitration is permissible unless expressly prohibited (*e.g.*, Br. 33) turns on its head the principle of this Court's cases that the scope and manner of arbitration are matters in which courts must enforce the boundaries of the parties' actual agreement. *E.g.*, *Volt*, 489 U.S. at 474-475 ("[T]he FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement.*' " (alteration in original) (quoting 9 U.S.C. § 4)).[5]

This case illustrates the basic flaw in Animalfeeds' proposed rule. Animalfeeds argues (Br. 42) that because there is no "precedent in maritime law" to the contrary, arbitration agreements widely used in the maritime industry should be read to permit class arbitration. But Animalfeeds did not (and does not) contest petitioners' expert testimony that no maritime precedent against class arbitration exists precisely because of the uniform industry understanding that the applicable arbitration language did not permit such arbitra-

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[4] Reference to these principles is particularly appropriate in the context of an arbitration agreement that was designed for use in international commerce, by parties from different legal systems, and that specifies that "arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act." JA30a; *see also* Pet. Br. 4-5 & n.4.

[5] Animalfeeds argues (Br. 40) that "[t]here is no general federal common law of contract interpretation." This Court has made clear, however, that the FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

tion. *See, e.g.*, JA139a ¶ 24 ("I have been working as a maritime arbitrator for thirty years and this matter is the first I have ever encountered where the issue of a class action arbitration has even been raised. ... None of the arbitrator colleagues—maritime and otherwise—to whom I have spoken have ever heard of the idea."); JA126a ¶ 21; Association of Ship Brokers and Agents (ASBA) Amicus Br. 33. Animalfeeds' proposed default statutory rule would thus produce a result exactly opposite to what the lack of a precedent in maritime law indicates about the boundaries of the parties' agreement.

B. Animalfeeds' Contractual Arguments Are Inapposite And Unpersuasive

Animalfeeds also argues (Br. 30-38, 42-51) that there is no ground for reversal because the arbitrators' decision to permit class arbitration was based on ordinary principles of contract interpretation. In that regard, Animalfeeds makes essentially three contentions. *First*, it relies on the text of the arbitration clause. *See* Br. 31-34, 37-38. That argument is meritless, but in any event it comes far too late. *Second*, Animalfeeds posits a "background rule ... that arbitration *procedures*, if not explicated, are delegated to the discretion of the arbitrators." Br. 36 (emphasis added); *see also* Br. 26, 33, 35-37. It offers no convincing response, however, to petitioners' demonstration (Pet. Br. 25-45) that a decision to change from bilateral to class arbitration is nothing like the sort of truly procedural decisions that may fairly be deemed delegated by contractual silence, such as whether to permit or forbid live testimony or how to limit or manage discovery. *Third*, it argues that class arbitration is a potentially workable adaptation of the traditional arbitration model, even in the interna-

tional maritime context (Br. 27-30, 42-49); that class arbitration is sometimes desirable to facilitate certain types of claims (Br. 49-51); and that public policy therefore supports construing contracts to allow class arbitration unless the parties have expressly forbidden it (*id.*). As explained below, those arguments provide no basis for arbitrators or courts acting under the FAA to impose class arbitration on private parties that have not actually agreed to it.

1. Animalfeeds' Textual Argument Is Inapposite As Well As Meritless

Before the arbitrators, the parties agreed that the text of their arbitration clause was silent on the question of class arbitration—in other words that, as Animalfeeds' counsel put it, "there's been no agreement ... reached on that issue." JA77a; *see also, e.g.*, Pet. App. 49a. Now, however, Animalfeeds argues (Br. 33-34, 37-38) that the words "any dispute"—which it at one point re-phrases as "all disputes," Br. 37—should be read to contemplate class proceedings. Whatever else might be said about that argument, it comes far too late. Here, unlike in *Bazzle*, the parties had a full opportunity to submit such questions of contract construction to the arbitrators, and this Court granted review on the premise that the arbitrators resolved those questions by finding the contract to be "silent." Pet. i; *cf. Bazzle*, 539 U.S. at 450-454 (plurality opinion). The issue now is the legal consequence of that silence.

In any event, the argument lacks merit. The Vegoilvoy arbitration clause states:

> Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer

> each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer.

JA30a; *see also* JA9a (defining "Owner" and "Charterer" as particular parties named in the agreement). As this fuller excerpt shows, "any dispute" means any dispute arising under the contract *between the two parties named therein*—the "Owner" and the "Charterer." Each is to choose one arbitrator to resolve *that* discrete dispute. The phrase speaks to what is to be arbitrated, not to who may be brought into the arbitration. Nothing in the phrase authorizes the injection of additional parties.[6]

2. The Availability Of Class Arbitration Is Not An Incidental Procedural Issue Implicitly Delegated To Arbitral Discretion

As to what should be done with a silent contract, Animalfeeds argues that if parties have not expressly *prohibited* class arbitration, they should be deemed as a matter of law to have "delegate[d] to the arbitrators broad power to employ appropriate procedures" (Br. 33)—including transforming the parties' bilateral arbitration into a class proceeding encompassing other parties, other agreements, and other claims. *See* Br. 32-33,

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[6] In addition, of course, petitioners submitted extensive and undisputed evidence showing a clear international maritime custom and practice of engaging in individual, not class, arbitration. Pet. App. 50a-51a; JA126a ¶ 21; JA139a ¶ 24; *see also* ASBA Amicus Br. 30 ("There has never been a class action resolved by international maritime arbitration.").

34-37. That argument fairly joins issue on the question presented, but Animalfeeds provides no persuasive reason for the Court to accept it.

Animalfeeds relies in part on *Bazzle*, arguing that the plurality treated the availability of class arbitration as "a question of procedure" to be resolved by arbitrators (Br. 35-36) and that its "premise was that the arbitration could go forward on a class basis so long as the contract did not forbid it" (Br. 27; *see also id.* at 36). That would not be a correct reading of *Bazzle* even if the plurality's decision were an authoritative statement of the law. The plurality reasoned that whether the relevant contracts prohibited or authorized class arbitration, as opposed to being silent on the issue, was a question of "contract interpretation and arbitration procedures" that arbitrators were "well situated to answer." 539 U.S. at 453; *see also id.* at 450, 452-453. That reasoning does not speak to what follows if the interpretation reveals that the contract is, in fact, silent, as the arbitrators determined here.

Moreover, in discussing whether the threshold issue of contractual silence was for arbitrators or courts, the *Bazzle* plurality contrasted "gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy," with the contractual question whether the parties had in fact agreed to permit or prohibit a particular type of arbitration proceeding. 539 U.S. at 452. The plurality drew (*id.* at 451-452) on cases recognizing the special "significance of having arbitrators decide the scope of their own powers," *First Options*, 514 U.S. at 945, and explaining that in some circumstances "contracting parties ... are not likely to have thought that they had agreed that an arbitrator would" decide a particular

question, *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002).

Those cases clarify that the sort of "procedural questions" the Court has viewed as "presumptively not for the judge, but for an arbitrator" are incidental issues such as whether "time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met." *Howsam*, 537 U.S. at 84-85. Once a contract has been construed to be silent as to class arbitration, the remaining question—whether arbitrators may nonetheless force a party into a class arbitration—is not a similarly "procedural" matter that it is likely a party, consulted *ex ante*, would reasonably have thought it had given its arbitrators *carte blanche* to decide. The class-arbitration question instead asks whether, under the FAA, an agreement between two parties to arbitrate disputes under a single contract authorizes the arbitrators chosen by those parties to resolve their dispute to assert (and courts to enforce) private arbitral "jurisdiction" over any number of *other* parties and contracts. That is a significant general legal question, as to which courts have the comparative advantage as decisionmakers. *See id.* at 85. As the Court observed in *Howsam*, "for the law to assume an expectation that aligns (1) decisionmaker with (2) comparative expertise will ... better ... secure a fair and expeditious resolution of the underlying controversy—a goal of arbitration systems and judicial systems alike." *Id.*

Animalfeeds points out that the Court has upheld arbitrators' authority to impose punitive damages and resolve statutory claims where those issues were not expressly mentioned in arbitration agreements. Br. 34-35 & n.9 (citing *Mastrobuono*, 514 U.S. at 58-59, and *Mitsubishi*, 473 U.S. at 626). It argues (Br. 34) that

these cases recognize the use of "broad terms to confer on arbitrators a range of powers not explicitly mentioned." In each case, however, the Court's decision was based on a conclusion about the actual intent (express or implied) of the parties when they concluded their agreements. *See Mastrobuono*, 514 U.S. at 58 ("[T]he case before us comes down to what the contract has to say about the arbitrability of petitioners' claim for punitive damages."); *Mitsubishi*, 473 U.S. at 626 ("[A]s with any other contract, the parties' intentions control."). Here, the parties have been found to have had no intent concerning class arbitration at the time of contracting. Nothing in the FAA or in this Court's cases suggests that, by contracting for traditional bilateral arbitration, the parties assumed a risk that the arbitrators would not only "employ procedures that they might not like" (Resp. Br. 26; *see also id.* at 45) but also fundamentally transform the parties to, scope, and nature of the proceeding.[7]

As petitioners' opening brief explains at length (at 28-45), class arbitration is a fundamentally "different animal [from] individual arbitration." *Dickler* v. *Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 (Pa. Super. Ct. 1991). Class arbitration dramatically alters the risks and benefits of the arbitration bargain. In this case, for example, expanding the arbitration to include

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[7] The arbitrators' acknowledgment that they would consider an opt-*in* mechanism to account for the "concern" that "the bulk of international shippers would never intend to have their disputes decided in a class arbitration" (Pet. App. 52a; *see also* Resp. Br. 48 & n.11) nicely underscores this point. That proposed solution, however, would address the lack of any actual agreement to class proceedings only for potential class members—not for petitioners. *See* Pet. Br. 20-25.

class claims would multiply the amount of commerce allegedly involved by a factor of 13,000 (Pet. Br. 28-29) and, as Animalfeeds itself has asserted, join as parties "at least hundreds" of additional oil, chemical, and specialty-liquids companies from around the world (CAJA A77 ¶ 31; JA67a). Such substantially raised stakes make class proceedings different in kind from bilateral disputes, where each party's exposure is naturally circumscribed. *See* Pet. Br. 29-30.

Imposing class arbitration would also override petitioners' core contractual right to select different arbitrators to handle their disputes with different counterparties under different agreements. *See* Pet. Br. 35-36. Animalfeeds responds (Br. 46) that defendants "generally know that claimants are seeking to proceed as a class" and may select arbitrators suitable for such proceedings. The issue is not, however, whether defendants can find arbitrators suitable to handle a class dispute. Ordinarily—and under the arbitration clause at issue here—a party that enters a number of bilateral arbitration agreements that give rise to disputes is contractually entitled to choose an arbitrator *in each case*. It might, of course, select one individual to handle a set of cases. Indeed, it might voluntarily agree to consolidated or class arbitration. Alternatively, however, the party might wish to select different arbitrators under different agreements—perhaps because of differences in the disputes, or perhaps simply in order to "avoid concentrating all of the risk of substantial damages awards in the hands of a single arbitrator." *Bazzle*, 539 U.S. at 459 (Rehnquist, C.J., dissenting). Taking away that choice radically alters the terms of its agreements.

Such transformations are too consequential for the availability of class arbitration to be classified as an incidental procedural matter that arbitrators may decide

for themselves in the absence of any agreement by the parties. They do not "grow out of" the arbitration the parties agreed to, *Howsam*, 537 U.S. at 84, but rather define essential boundaries of the arbitration itself.

3. Arbitrators Have No Authority To Impose Class Arbitration On The Basis Of Feasibility Or Public Policy

Finally, Animalfeeds repeats (Br. 17, 49-51) the argument with which it prevailed before the arbitrators: that the contract should be construed to permit class arbitration "'as a matter of public policy'" (Pet. Br. 22 (quoting CAJA A308-A309)). It contends that class arbitrations are a feasible adaptation of the traditional bilateral model, even in the international maritime context (Resp. Br. 27-30, 42-49), and that they may sometimes be necessary to "capture efficiencies" required for private enforcement of the Sherman Act (Br. 46, 49-51). Accordingly, the argument runs, holding that the silence of the Vegoilvoy contract precludes class arbitration "would lead either to the inefficiencies and unfairness of multiple, separate arbitrations on common issues, or, more realistically, would make it untenable for would-be class members to proceed individually." Br. 18. And such considerations, according to Animalfeeds (Br. 32-33, 49), are a proper basis for arbitrators to interpolate the availability of class arbitration into a contract that is silent on that question.

As petitioners have argued (*e.g.*, Pet. Br. 23-24, 25-28), that analysis cannot be reconciled with this Court's repeated holdings that arbitration under the FAA is a matter of private ordering based on actual consent. Indeed, the Court has required a two-step inquiry in the enforcement of arbitration agreements precisely in order to isolate the task of contract interpretation from

extrinsic legal or policy considerations. *See Mitsubishi*, 473 U.S. at 628 (courts must "first determin[e] whether the parties' agreement to arbitrate reached the [relevant] issues, and then, upon finding it did, consider[] whether legal constraints external to the parties' agreement foreclose[] the arbitration of those claims"). The legal and policy questions are reserved for separate judicial inquiry into the enforceability of an agreement to arbitrate under 9 U.S.C. § 2. *See* Pet. Br. 50-51. Unless an arbitration agreement is determined to be unenforceable, however, its metes and bounds must be scrupulously honored—even if the result is manifestly *in*efficient. *See* Pet. Br. 46-47 (discussing *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985), and *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983)).

Moreover, even on their own terms, Animalfeeds' policy arguments are unpersuasive. As to this case, Animalfeeds never recants its representation to the arbitrators that it intends to proceed individually against petitioners even if there are no class proceedings. *See* Pet. Br. 51 (quoting CAJA A2366-A2367). It also acknowledges (Br. 50 & n.12) that the record in this case does not establish that litigating on an individual basis would be prohibitive for any other claimant. Accordingly, its arguments about the need for class arbitration (Br. 18, 50, 51) are conspicuously hypothetical.[8]

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[8] They will remain hypothetical, moreover, as to all of the original claimants except Animalfeeds, because petitioners have reached settlements with *every one* of them—belying Animalfeeds' suggestions (*e.g.*, Br. 5-6) that bilateral arbitrations are not an effective way of resolving disputes and providing claimants with any appropriate compensation.

In that regard, as Animalfeeds correctly observes (Br. 27), petitioners have not argued that class arbitration is unworkable under any circumstances, or that parties may not agree to it if they choose. *See, e.g.*, Pet. Br. 33, 41. Absent such agreement, however, Animalfeeds is forced to concede the substance of many of the concerns petitioners have raised: that judicial oversight is needed to protect the due process rights implicated by class proceedings (Br. 47); that "[c]lass arbitration does require some public disclosure" of otherwise confidential matters (*id.*); and even that there is no precedent for the enforcement of class arbitration awards, either within the United States or abroad (Br. 47-48).

Animalfeeds argues (Br. 48) that appropriate procedures can be devised to address these or similar concerns domestically, and that any foreign resistance is simply "irrelevant to interpretation of the FAA." The devices it proposes, however, such as judicial oversight, notice and opt-out (or opt-in) procedures, and the use of specialized private rules mirroring Rule 23 of the Federal Rules of Civil Procedure (*see* Br. 28-29, 47-48), would replicate the class action procedures of the federal court system. That calls into question why parties would opt to settle disputes in a private system with all the disadvantages of litigation and none of its benefits. *See, e.g.*, *Shroyer* v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 986-987 (9th Cir. 2007) (giving effect to severability provision under which entire arbitration clause became unenforceable when express waiver of

class arbitration was held to be unconscionable); Chamber of Commerce Amicus Br. 2; DRI Amicus Br. 16-29.[9]

More fundamentally, the argument ignores that public rules and procedures are developed, evolve, and are enforced by public officials (including judges), wielding public authority, with their ability to compel compliance from parties defined and limited by generally applicable rules of jurisdiction, statutory and court rules (including appellate review), and rules of due process. Arbitration, on the other hand, is a form of private ordering, in which arbitrators draw their authority solely from the parties' agreement to submit to it. *See* Pet. Br. 18. Neither the supposed desirability of class arbitration nor the ability of arbitrators or private rule-makers to address its complexities if parties authorize them to do so can answer the question presented in this case: whether parties may be compelled to submit to class arbitration when, as is established here, their agreement to arbitrate is silent on that question. Because arbitration is solely a matter of consent and because class arbitration is fundamentally different from a bilateral proceeding, the answer to that question must be "no."[10]

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[9] *Cf. In re Am. Express Merchants' Litig.*, 554 F.3d 300, 321 (2d Cir. 2009) ("[I]n light of the fact that Amex declared at oral argument that it would reconsider its intention to proceed to arbitration should this Court not enforce the class action waiver, we remand to the district court to allow Amex the opportunity to withdraw its motion to compel arbitration."), *cert. pending sub nom. American Express Co* v. *Italian Colors Rest.*, No. 08-1473 (filed May 29, 2009).

[10] Several of Animalfeeds' amici argue at length that class arbitration must be available, for policy reasons, in other contexts, such as cases involving employment discrimination or consumer

III. ANIMALFEEDS' RENEWED RIPENESS ARGUMENT IS MERITLESS

Animalfeeds concludes its brief by asserting, "[a]s a threshold matter" (Br. 51), that this case is unripe. Like Animalfeeds' other arguments for avoiding a ruling on the question presented, this claim was advanced at the petition stage, Br. in Opp. 23-26, and "necessarily ... rejected" when the Court granted review, *Williams*, 504 U.S. at 40. Animalfeeds suggests nothing that would justify a different conclusion now.

"[R]ipeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). Constitutional ripeness is at issue regardless of whether a party raises it or pressed it below. *E.g.*, *United States* v. *Cotton*, 535 U.S. 625, 630 (2002). Prudential ripeness, in contrast, does not implicate jurisdiction, and hence a court "may"—but need not—raise the issue on its own. *National Park Hospitality Ass'n* v. *Department of the Interior* (*NPHA*), 538 U.S. 803, 808 (2003). The non-

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contracts. As petitioners' opening brief explains (at 49-51), reversal here might well not dictate the result in cases involving different agreements arising in those different contexts. In such cases there might, for example, be grounds not present here for properly inferring agreement to class arbitration, such as textual ambiguities that could properly be construed against a more sophisticated and economically superior drafter. Alternatively, in other contexts there might be valid grounds for setting aside entirely, as unconscionable under the circumstances, any arbitration clause that does not allow class arbitration. In any event, questions that could arise in those contexts are not a proper basis for distorting the conventional, consent-based FAA analysis that dictates reversal here.

jurisdictional nature of prudential ripeness also means that it can be waived, particularly if "raised defensively late in the lawsuit." *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 504 (2006). That is certainly the situation here.

In considering ripeness, courts "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149 (1967). Animalfeeds makes no argument regarding fitness of the issues, instead focusing solely on hardship (and other policy concerns). But while "both constitutional and prudential concerns operate" with regard to fitness, the hardship factor "is entirely prudential." *McInnis-Misenor* v. *Maine Med. Ctr.*, 319 F.3d 63, 70 (1st Cir. 2003). By waiting three years to raise any ripeness issue—and, indeed, expressly agreeing both to immediate judicial review of the arbitrators' ruling, *see, e.g.*, Pet. App. 3a-4a, and to stays of the arbitration at every level of judicial review—Animalfeeds has waived any prudential ripeness arguments it might once have had.[11]

In any event, the case is ripe. The question presented is certainly fit for review: It is "a purely legal

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[11] Amicus Public Citizen argues (Br. 7-15) that the arbitrators' ruling is not a final award under the FAA and hence was never subject to judicial review. Petitioners addressed that contention when Animalfeeds advanced it in opposing certiorari. *See* Brief in Opp. 27-28; Reply Br. 11-12. Finality under the FAA does not implicate subject-matter jurisdiction, *see Moses H. Cone*, 460 U.S. at 26 n.32, and because the issue was waived in the lower courts, was evidently rejected by this Court in granting certiorari, and is not even advanced by a party on the merits, this Court surely "has no occasion to consider" it, *Bell* v. *Wolfish*, 441 U.S. 520, 531 n.13 (1979).

one," *Abbott Labs.*, 387 U.S. at 149, and will not be clarified by "further factual development," *NPHA*, 538 U.S. at 812.

Nor is there any basis for concern about "the need to protect the integrity of the ongoing arbitral process." Resp. Br. 53; *accord id.* at 57. The FAA authorizes review of "partial award[s]." 9 U.S.C. § 16(a)(1)(D); *compare* Resp. Br. 56. Here the parties' supplemental agreement, by partially incorporating the AAA's class arbitration rules, expressly provides for the issuance of such an award and for immediate judicial review. Thus, the "arbitral process" is proceeding not only in accordance with the FAA but also in precisely the fashion the parties intended. Moreover, the decision adverse to petitioners has been "formalized," and absent review will be promptly "felt in a concrete way," *Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 200 (1983), through an involuntary, protracted class-certification proceeding likely involving extensive fact and expert discovery. Under these circumstances, any prudential ripeness standard is easily met.[12]

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[12] Animalfeeds quotes (Br. 53) this Court's observation that litigation costs alone do not justify review "in a case that would otherwise be unripe," *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 735 (1998). Here, however, the case is not "otherwise ... unripe," *id.*, and the costs petitioners would incur from delay are more than adequate to support immediate review. They are augmented by the harm of being coerced into non-consensual arbitration proceedings, in violation of what the Court's FAA decisions make clear is a "value of a high order" under that statute, *Will* v. *Hallock*, 546 U.S. 345, 352 (2006). And none of that even begins to take into account the tremendous waste of judicial resources that would be entailed by deciding, at this point in this litigation, that this Court, rather than resolving the question presented, should

In asserting the contrary, Animalfeeds (Br. 55) cites *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528 (1995), and *PacifiCare Health Systems, Inc.* v. *Book*, 538 U.S. 401 (2003). In each of those cases, however (as in *Bazzle*), the arbitrator had not addressed the pertinent issue, and this Court unsurprisingly declined to act on "'mere speculation'" about what the arbitrators would do. *Id.* at 406 (quoting *Vimar*, 515 U.S. at 541). Because the arbitrators here *have* ruled on the relevant question, these cases do not help Animalfeeds.

Finally, there is no basis for Animalfeeds' dire prediction (Br. 55-56) that a ruling on the merits here will force lower courts to decide a flood of petitions seeking judicial review of preliminary arbitration rulings. The arbitrators here exceeded their authority by imposing a form of arbitration to which petitioners never consented. That fundamental error. and the court of appeals' endorsement of it, was caused by a misinterpretation of this Court's decision in *Bazzle*. Other arbitrators (and courts) have committed the same error for the same reason. *See* Pet. 13-15. This case presents an opportunity to end the confusion over *Bazzle*, and thus the repeated violation of parties' rights not to be forced to arbitrate except in the way to which they consented—an opportunity that the Court may not have again anytime soon, *see* AAA Amicus Br. 22-23 (in six

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vacate the decisions of the district court and court of appeals and return the matter to the arbitrators—leaving every issue otherwise addressed over the last four years to be litigated anew if and when the arbitrators certify a class, or perhaps only once they have conducted a full class arbitration and rendered a putatively definitive award. *See* Resp. Br. 59. As this Court commented in *Williams*, "[t]hat would be improvident indeed." 504 U.S. at 40.

years since *Bazzle*, not one of hundreds of putative class arbitrations filed with the AAA has yielded a final award). Few cases are likely to present similarly compelling grounds for immediate review.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 2009

AMICUS CURIAE BRIEF

No. 08-1198

In The

Supreme Court of the United States

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE, THE AMERICAN INDEPENDENT BUSINESS ALLIANCE, AND THE NATIONAL COMMUNITY PHARMACISTS ASS'N AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The American Antitrust Institute (AAI) is an independent non-profit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. *See* http://www.antitrustinstitute.org. AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 90 prominent antitrust lawyers, law professors, economists, and business leaders.[2] AAI submits this brief because a policy that disfavors collective arbitrations, as advocated by petitioners, would undermine the enforcement of the antitrust laws by significantly increasing the risks that victims of price-fixing conspiracies will be unable to vindicate their statutory rights.

The American Independent Business Alliance (AMIBA) is a non-profit advocacy and education organization that helps communities design and

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[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel have made a monetary contribution to its preparation or submission.

[2] AAI's Board of Directors alone has approved of this filing for AAI. The individual views of members of the Advisory Board may differ from AAI's positions. Certain members of the Advisory Board serve as counsel for respondent, but they played no role in the Directors' deliberations with respect to this brief.

implement programs to support independent locally owned businesses and maintain ongoing opportunities for entrepreneurs. *See* http://amiba.net/. AMIBA supports more than 65 affiliates (community organizations) across 32 states and has helped many more cities and towns with programs to support their local independents. AMIBA's affiliates represent more than 15,000 independent businesses across virtually every sector of business. AMIBA is concerned that restricting the ability of businesses to unite in class arbitrations will harm small and independent business, which provide an important competitive check against their larger rivals. Small and independent businesses are already vulnerable to powerful suppliers. The only practical way for them to protect themselves against anticompetitive conduct by suppliers is by uniting in a class action or class arbitration.

The National Community Pharmacists Association (NCPA) is a non-profit trade association that represents the pharmacist owners, managers, and employees of more than 23,000 independent community pharmacies across the United States. *See* http://www.ncpanet.org/. Independent pharmacies dispense more than 41% of the nation's retail prescription medicines. NCPA believes in the inherent virtues of the American free-enterprise system and seeks to ensure the ability of independent community pharmacists to compete in a free and fair marketplace. However, the ability of independent pharmacies to compete is impaired when they are

prevented from combining to pursue antitrust claims in class actions or class arbitrations.[3]

SUMMARY OF ARGUMENT

It would be anomalous if admitted members of a global criminal price-fixing cartel were given the benefit of the doubt in interpreting a silent arbitration clause to preclude class arbitration when it would be superior to other available methods for fairly and efficiently adjudicating the claims of cartel victims, if not the only practical means by which many of the customers of the cartel may recover. Barring class arbitration of Sherman Act claims absent a clear statement to the contrary, as petitioners propose, is inconsistent with the longstanding objectives of the private treble-damages remedy.

The private treble-damages action has always been "a bulwark of anti-trust enforcement," *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968), and remains so today. It operates as a complement to the government's criminal and civil enforcement actions, allowing the government to focus on prosecution rather than compensation, and

[3] NCPA is a party to class-action lawsuits challenging certain practices of pharmacy benefit managers under the Sherman Act, one of which has been ordered to arbitration. One of the counsel for respondent here also represents the NCPA in those actions.

as a substitute for government enforcement in other cases because the enforcement agencies cannot be expected to ferret out all or even most of the anticompetitive conduct in the economy. Indeed, private enforcement is the dominant way that the antitrust laws are enforced, and the treble-damages remedy provides most of the deterrent value of the monetary sanctions against antitrust violations. But without class actions, the treble-damages remedy would be largely defanged in cases of cartels and other antitrust violations that cause widespread harm to many victims, where individual actions are generally prohibitively costly.

In order to preserve the deterrent value of the private treble-damages action, class arbitrations should not be disfavored by petitioners' clear-statement rule. On the contrary, antitrust policy and ordinary principles of contract construction demand that ambiguous arbitration agreements be construed to permit class arbitration. Indeed, given the risks that victims of price-fixing conspiracies will be unable to vindicate their statutory rights, waivers of class actions, in court or arbitration, should be disfavored.

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ARGUMENT

I. CLASS ACTIONS ARE ESSENTIAL TO ANTITRUST ENFORCEMENT

A. Private Antitrust Enforcement Is an Integral Part of the Congressional Plan to Protect Competition

The Sherman Act is "a comprehensive charter of economic liberty," *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 4 (1958), "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). "Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972).

This Court has often emphasized the importance of private actions to the enforcement of the antitrust laws. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("Without doubt, the private cause of action plays a central role in enforcing this regime."); *California v. American Stores Co.*, 495 U.S. 271, 284 (1990) (describing private enforcement as "an integral part of the congressional plan for protecting competition"); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977) (recognizing "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws"). To ensure vigorous private enforcement, Congress

expressly authorized private parties injured by antitrust violations to sue in federal courts without regard to the amount in controversy, and provided for mandatory treble damages, plus attorneys' fees and costs for successful plaintiffs.[4] *See* 15 U.S.C. § 15.

"[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969). Indeed, "[t]he treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators." *Mitsubishi Motors*, 473 U.S. at 635; *see Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) ("Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations.").

The bipartisan Antitrust Modernization Commission, created by Congress, recently reviewed the civil and criminal remedies under the antitrust laws and reiterated that "[p]rivate antitrust enforcement plays

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[4] The provisions in § 5 of the Clayton Act that suspend the statute of limitations for private actions during the pendency of a government suit and that allow plaintiffs to use a final judgment in a government action as *prima facie* evidence of liability in a later private action, *see* 15 U.S.C. §§ 16(a), (i), are further evidence that "[p]rivate enforcement of the Act was in no sense an afterthought . . . ." *American Stores*, 495 U.S. at 284.

a critically important role in implementing the U.S. antitrust laws." Antitrust Modernization Commission Report & Recommendations ("AMC Report") 243 (2007). The AMC recommended that the treble-damages rule be retained in its current form because it "well serves" its deterrence and compensation objectives. *Id.* at 246; *see id.* at 247 ("There is broad consensus that treble damages are appropriate for hard-core cartel conduct.").

Treble damages are critical for deterrence because "some anticompetitive conduct is likely to evade detection and challenge," and therefore antitrust violations would be profitable *ex ante* if violators were liable only for single damages or the amount of their overcharges. *Id.* at 246; *see generally* William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. Chi. L. Rev. 652, 656-57 (1983); *see also Perma Life Mufflers*, 392 U.S. at 139 ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."). Moreover, as the AMC noted, "[t]reble damages help to ensure that the violator pays damages that more fully reflect the harm to society caused by the anticompetitive conduct" that is otherwise not recoverable, AMC Report at 246, including the time value of money (prejudgment interest), allocative efficiency losses, and "umbrella effects." *See generally* Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 Ohio St. L. J. 115 (1993).

Treble damages also promote the antitrust law's compensation goal. As the AMC noted, "in light of the fact that some damages may not be recoverable (e.g., compensation for interest prior to judgment, or because of the statute of limitations and the inability to recover 'speculative' damages) treble damages help ensure that victims will receive at least their actual damages." AMC Report at 246; *see also American Soc'y of Mechanical Engineers, Inc. v. Hydrolovel Corp.*, 456 U.S. 556, 575 (1982) ("Treble damages 'make the remedy meaningful by counterbalancing the difficulty of maintaining a private suit' under the antitrust laws." (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977))) (internal quotation marks omitted).

B. Private Actions Are the Dominant Way the Antitrust Laws Are Enforced

The Court has repeatedly referred to the private litigant's role in antitrust enforcement as that of a "private attorney general." For example, in *Mitsubishi Motors*, the Court observed, "The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest." 473 U.S. at 635 (internal quotation marks omitted); *Associated Gen. Contractors v. Carpenters*, 459 U.S. 519, 542 (1983) (describing private parties bringing antitrust actions as performing "the office of a private attorney general"); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987)

(Clayton Act "bring[s] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate"); *Hawaii v. Standard Oil*, 405 U.S. at 262 (by enacting the antitrust laws, "Congress encouraged [private parties] to serve as 'private attorneys general'").

Indeed, private actions are the dominant means by which antitrust violations are remedied and deterred. In *Reiter*, the Court noted "private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." 442 U.S. at 344. In the late 70's, when the Court decided *Reiter*, "nearly 20 times as many private antitrust actions [were] pending in the federal courts as actions filed by the Department of Justice." *Id.* Today, the number of private antitrust cases brought in federal court exceeds the number of U.S. government actions (civil and criminal) by more than 25 to 1. Although the number of private actions has declined significantly since 1978, the number of government actions has fallen even more sharply (in percentage terms). *See* American Antitrust Institute, *The Next Antitrust Agenda* 222, 228 (Albert A. Foer ed., 2008).

Enforcement by "private attorneys general" serves an important and unique role in Congress' overall enforcement scheme, sometimes as a complement to government enforcement (in "follow on" actions), sometimes as a substitute. A study analyzing 40 of some of the largest recent successful private

antitrust cases found that of the $18-19.6 billion recovered for victims in those cases, almost half of the total recovery came from 15 cases that did not follow government actions. *See* Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F.L. Rev. 879, 897 (2008).[5] Notably, the total amount of criminal fines obtained by the government during the same period for all prosecutions ($4.2 billion) was less than one quarter of the private recoveries in the 40 cases studied and significantly less than the private recoveries in the 11 cases in the study that involved criminal penalties. *See id.* at 893-95.[6]

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[5] In addition to the 15 cases that clearly did not follow government actions, another six cases involved "mixed" public/private origin, which netted recoveries of $4.2 billion, and nine other cases provided relief significantly broader in scope than the government enforcement action. *See* Lande & Davis at 897-98, 909-10. Sometimes, it was the government that piggybacked on private actions. *See, e.g., In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 n.31 (E.D.N.Y. 2003); *In re Vitamins Antitrust Litig.*, 398 F. Supp. 2d 209, 226 (D.D.C. 2005) (explaining that class-action counsel uncovered the illegal activity of vitamin manufacturers across the globe and shared the information with the Department of Justice "enabling the criminal investigation to begin").

[6] The study did not compare the criminal fines obtained in the 11 cases to the civil recoveries in those cases. The vitamins cartel is instructive, however. That "case" led to record criminal fines of about $900 million and private recoveries of $3.9 to $5.2 billion. *See* John M. Connor, *The Great Global Vitamins Conspiracies, 1985-1999* at 131 (Apr. 9, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120936. Notably, despite the enormous sanctions, the combined criminal and private

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In many instances, private enforcement is the only available means to redress an antitrust violation. As Professors Lande and Davis explain:

> As a practical matter, the government cannot be expected to do all or even most of the necessary enforcement for various reasons including: budgetary constraints; undue fear of losing cases; lack of awareness of industry conditions; overly suspicious views about complaints by "losers" that they were in fact victims of anticompetitive behavior; higher turnover among government attorneys; and the unfortunate, but undeniable, reality that government enforcement (or non-enforcement) decisions are, at times, politically motivated.

Lande & Davis at 906.

Professor Baxter, President Reagan's antitrust chief, noted that private litigants with specialized knowledge "may have a comparative advantage over the Division in the cost of and efficiency in prosecuting a given case," and that private litigation frees up "the government to prosecute and spend resources . . . against more systemic violations for which no private plaintiff is likely to sue or for which criminal sanctions are desirable." William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 Tex.

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recoveries amounted to less than 80% of the cartel overcharges in real terms. *See id.* at 139-40.

L. Rev. 661, 690-91 (1982). Baxter suggested that the executive branch has come to rely on private enforcement because the "common-law approach to antitrust law adopted by Congress requires that the executive branch have discretion to select the particular cases it prosecutes" and "to the extent that suits by private plaintiffs produce an efficient development of antitrust law, it becomes less critical for the executive branch to ensure that the courts have appropriate cases and arguments before them." *Id.* at 678, 682.

In fact, the Department of Justice routinely relies on private treble-damages antitrust lawsuits to provide victims with restitution in cases where it has criminally prosecuted the antitrust violators. Although restitution is required under the Department's corporate leniency program, *see* Dep't of Justice, Corporate Leniency Policy (Aug. 10, 1993), http://www.usdoj.gov/atr/public/guidelines/0091.pdf, and is permitted in plea bargains, *see* 18 U.S.C. § 3663(a)(3), "[i]n most Sherman Act criminal cases, restitution is not sought or ordered because civil causes of action will be filed to recover damages," Dep't of Justice, Model Annotated Corporate Plea Agreement Last Updated July 13, 2009 at 7 n.6, http://www.usdoj.gov/atr/public/guidelines/corp_plea_agree.pdf; *see also id.* at 9 n.14 ("It is extremely rare to have restitution included as part of a plea agreement in a Sherman Act case, as civil suits are normally filed by victims to recover damages."); Dep't of Justice, Frequently Asked Questions Regarding the Antitrust Division's

Leniency Program and Model Leniency Letters 18 (Nov. 19, 2008) ("Restitution is normally resolved through civil actions with private plaintiffs."), http://www.usdoj.gov/atr/public/criminal/239583.pdf. For instance, in this case the government did not seek restitution from petitioners Odfjell and Jo Tankers because it assumed that the "pending civil actions" would take care of it. *See* Resp. Br. 6 (citing sentencing memoranda).

C. Collective Actions Are Necessary to Make the Treble-Damages Remedy Meaningful

Class actions play a particularly important role in ensuring that the treble-damages remedy serves its intended function of deterring antitrust violations and compensating victims.[7] As the AMC concluded, "[t]he vitality of private antitrust enforcement in the United States is largely attributed to two factors: (1) the availability of treble damages plus costs and attorneys' fees, and (2) the U.S. class action mechanism, which allows plaintiffs to sue on behalf of both

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[7] Congress has recognized the importance of class actions to the legal system generally. In the Class Action Fairness Act of 2005, Congress found that although there have been some abuses, which the Act sought to correct, "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action . . . ." Pub. L. No. 109-2, § 2(a)(1), 119 Stat. 4 (2005).

themselves and similarly situated, absent plaintiffs." AMC Report at 241. The Court has emphasized the important role that class actions play in enforcing the federal antitrust laws. *See, e.g., Hawaii v. Standard Oil*, 405 U.S. at 266 ("[C]lass actions . . . may enhance the efficacy of private [antitrust] actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture."); *Reiter*, 442 U.S. at 343 n.6 (noting that "the treble-damages remedy of § 4 took on new practical significance for consumers with the advent of Fed. Rule Civ. Proc. 23"); *see also In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 21 (D.D.C. 2001) ("[L]ong ago the Supreme Court recognized the importance that class actions play in the private enforcement of antitrust actions .... Accordingly, courts have repeatedly found antitrust claims to be particularly well suited for class actions . . . .").

Cartels and other antitrust violators that inflict widespread economic harm would have little to fear from the treble-damages remedy without class actions because individual treble-damages actions by customers are not common. For example, in the Lande and Davis study of 40 of some of the most successful recent private antitrust cases, only six did not involve class actions, *see* Lande & Davis at 901, and those were suits by competitors, *see id.* at 899.[8]

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[8] To be sure, large firms may opt out of class actions to pursue their claims separately, particularly where liability is clear, but those opt-out actions often benefit from class actions

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Private antitrust actions are extremely expensive to pursue either in arbitration or in court because they involve "complicated question[s] of fact" and the application of "equally complex" law to those facts. *Kristian v. Comcast Corp.*, 446 F.3d 25, 58 (1st Cir. 2006). Attorneys' fees and expert witness fees, even in garden-variety price-fixing cases, typically will be in the millions of dollars. *See, e.g., In re Electrical Carbon Products Antitrust Litig.*, 447 F. Supp. 2d 389, 409-10 (D.N.J. 2006) (fees and expenses exceeded $6 million in case that settled before class certification; approximately $400 million of purchases at issue). Even when some of the defendants have pled guilty to criminal price-fixing charges, pursuing a private damages action can "be quite onerous, expensive, and time-consuming," *id.* at 399, because liability against other defendants may not be easy to prove, the statute of limitations (and the period of liability) will frequently be at issue, and it is costly to prove damages, not to mention defend against the inevitable motions to exclude expert witnesses and other motions that defendants file. The fact that the prevailing plaintiff's attorneys' fees are recoverable under the Clayton Act does not ordinarily make individual actions (in arbitration or court) practical because expert witness expenses are effectively not

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being brought in the first instance. *See, e.g., In re Linerboard Antitrust Litig.*, 333 F. Supp. 2d 343, 349 (E.D. Pa. 2004) (identifying discovery and other benefits that class counsel afforded opt-out plaintiffs).

recoverable, *see In re American Express Merchants' Litig.*, 554 F.3d 300, 318 (2d Cir. 2009), *cert. pending sub nom. American Express Co. v. Italian Colors Restaurant*, No. 08-1473 (filed May 29, 2009), and the recovery of attorneys' fees does not compensate attorneys for the risk of not prevailing, *see Kristian*, 446 F.3d at 59 n.21 (noting that disproportion between fees and recovery would make it difficult for attorney to justify being made whole, and "being made whole is hardly a sufficient incentive for an attorney to invest" in an uncertain case on a contingent basis); *City of Burlington v. Dague*, 505 U.S. 557 (1992) (under common fee-shifting statute, lodestar may not be adjusted upward to reflect the fact that attorneys were retained on a contingent-fee basis).

Given the expense of litigation, individual antitrust cases challenging cartel behavior are often negative value cases, *i.e.*, cases "in which the stakes to each member are too slight to repay the cost of the suit." Alba Conte & Herbert B. Newberg, 2 *Newberg on Class Actions* § 4:33, at 290 (4th ed. 2002). "Economic reality dictates" that such actions "proceed as a class action or not at all." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974); *see Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries

into something worth someone's (usually an attorney's) labor.'" (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))).

The existence of a negative value suit is often said to be the "most compelling rationale for class certification." *E.g., Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 312 (D.D.C. 2007) (internal quotation marks omitted); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually."); *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980) (class action "may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise" thereby "vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost").

Even when an individual case against a cartel might be economically feasible, direct purchasers may be hesitant to bring suit "for fear of disrupting relations with their suppliers." *Illinois Brick*, 431 U.S. at 746. By providing safety in numbers, the class-action device allows businesses to sue their suppliers without fear of retribution. Moreover, where there are many victims, multiple individual actions will inevitably be more costly than a properly certified collective action; indeed, a collective arbitration or class action may only go forward where the arbitrator or court determines that a class action is "superior to other available methods for fairly and

efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); American Arbitration Ass'n Supplementary Rules for Class Arbitration 4(b) (same). Raising the cost of private suits by requiring plaintiffs to use inferior and less efficient methods of adjudication hardly seems consistent with "the legislative purpose in creating a group of private attorneys general to enforce the antitrust laws . . . ." *Illinois Brick*, 431 U.S. at 746 (internal quotation marks omitted).

II. PRE-DISPUTE WAIVERS OF CLASS ARBITRATIONS IN ANTITRUST CASES SHOULD BE DISFAVORED

In *Mitsubishi Motors*, the Court, while recognizing the importance of the private damages remedy and that a "'claim under the antitrust laws is not merely a private matter,'" overturned the then-uniform rule of the courts of appeal that federal antitrust claims were not arbitrable under the *American Safety* doctrine. 473 U.S. at 635 (quoting *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826 (2d Cir. 1968)). The Court held that an agreement to arbitrate such claims could be enforced, "at least where the international cast of a transaction would otherwise add an element of uncertainty to dispute resolution . . . ." *Id.* at 636.[9]

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[9] The Reagan Administration had urged the Court not to overturn the bar against arbitrating antitrust claims because the "important public interest ingredient of antirust claims . . . renders them inappropriate for determination by arbitration."

(Continued on following page)

Importantly, however, the Court held that such an agreement would not be enforceable where arbitration would not permit the litigant to vindicate his or her statutory rights. The Court declared that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function," *id.* at 637, but "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy," *id.* at 637 n.19; *see also Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79, 90 (2000) (reaffirming that an arbitration provision could only be enforced so long as the prospective litigant could effectively vindicate his or her statutory rights).

The vindication-of-statutory-rights qualification to the enforceability of agreements to arbitrate antitrust claims is consistent with the established principle that "an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy." *American Express,* 554 F.3d at 319; *see Mitsubishi Motors*, 473 U.S. at 637 n.19 (citing cases); *Lawlor v. Nat'l Screen Service Corp.*, 349 U.S. 322, 329 (1955)

Brief for the United States as Amicus Curiae Supporting Respondent at 12, *Mitsubishi Motors*, 473 U.S. 614 (1985) (No. 83-1569), 1985 WL 669814.

("in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action," an agreement that confers even "a partial immunity from civil liability for future violations" is inconsistent with the antitrust laws); *Kristian*, 446 F.3d at 48 (prospective waiver of treble damages is not enforceable).

Petitioners suggest that because respondent is not an individual consumer it does not need the benefit of the collective action device to vindicate its statutory rights. *See* Pet. Br. 50-51. However, as the Second Circuit explained in *American Express*, the vindication-of-statutory-rights analysis does not depend "on the 'size' of any or all of the merchant plaintiffs; it depends upon a showing that the size of the recovery received by any individual plaintiff will be too small to justify the expenditure of bringing an individual action." 554 F.3d at 320. Antitrust class actions are routinely brought by classes composed of business entities, as opposed to individual consumers. *See, e.g., In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82 (D. Conn. 2009) (class consisting of purchasers of synthetic rubber, primarily companies in roofing and automotive industries); *Visa Check/MasterMoney*, 297 F. Supp. 2d 503 (class comprised of merchants that accepted credit cards); *Linerboard*, 333 F. Supp. 2d 343 (class comprised of purchasers of corrugated sheets and containers). Indeed, because of the *Illinois Brick* rule, which precludes indirect purchasers from obtaining damages for federal antitrust violations, *see Illinois Brick*, 431 U.S. 720, businesses are the only victims

that can recover in most price-fixing cases, and they act as a surrogate for injured consumers down the chain of distribution who absorb much of the overcharge.[10]

Assuming they are enforceable at all, waivers of collective actions in antitrust cases – whether implied, as petitioners contend here, or express – should be disfavored because they significantly threaten to prevent victims of antitrust violations from vindicating their statutory rights and to undermine the deterrent value of the treble-damages remedy. As explained above, given the expense of antitrust litigation in relation to the potential individual recoveries in actions against cartels and other violations involving widespread harm, the alternative to a collective action in such cases is not likely to be many individual actions, but few actions at all. *See, e.g.*, *American Express*, 554 F.3d at 320 (holding that a class-action waiver could not be enforced "because to do so would grant Amex de facto immunity from

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[10] *Illinois Brick* was based on the assumption that allowing direct purchasers to recover the full amount of the overcharge, regardless of their actual harm, best served the consumer-protective deterrence objectives of the treble-damages remedy. *See* 431 U.S. at 746. Class-action waivers undermine that assumption. As Professor Gilles has explained, "the only people who can bring an antitrust class action in federal court [direct purchasers] are those upon whom collective action waivers may most easily and directly be imposed." Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 418 (2005).

antitrust liability by removing plaintiffs' only reasonably feasible means of recovery"); *Kristian*, 446 F.3d at 61 (declining to enforce class-action waiver on the ground that "the social goals of federal and state antitrust laws will be frustrated because of the 'enforcement gap' created by the de facto liability shield"). With collective-action waivers, companies that engage in price fixing may be able to limit, and in many cases eliminate, their exposure to treble damages for the harm they cause, making it more likely that the crime will pay.[11]

In any event, the significant risk that class-action waivers would prevent victims of antitrust violations from vindicating their statutory rights and undermine the deterrent value of the treble-damages remedy is sufficient to reject petitioners' proposed

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[11] To be sure, the Court has held in an action under the Truth in Lending Act that a party that "seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs." *Randolph*, 531 U.S. at 92. However, this is not inconsistent with a presumption against enforcing waivers of collective actions because such a presumption does not affect whether claims will be arbitrated, but only affects the form the arbitration will take. *Cf. American Express*, 554 F.3d at 310 (noting that the issue of whether to enforce class-action waiver in arbitration does not implicate "the ancient judicial hostility to arbitration" as a form of dispute resolution) (internal quotation marks omitted). Moreover, a claim under the Truth in Lending Act does not involve the same privileged status as private antitrust actions which uphold our "charter of economic liberty."

rule of construction that "silent" arbitration clauses should be read to preclude class arbitration. *See Time Warner Entertainment Co. v. Everest Midwest Licensee, L.L.C.*, 381 F.3d 1039, 1045 (10th Cir. 2004) ("Contracts affecting the public's interest generally are liberally interpreted to favor the public.") (internal quotation marks omitted); *Herrera v. Katz Communications, Inc.*, 532 F. Supp. 2d 644, 647 (S.D.N.Y. 2008) (interpreting ambiguous arbitration agreement to permit recovery of prevailing plaintiff's attorneys' fees where the interpretation "serves the public interest" under the civil rights laws).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

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v.

ANIMALFEEDS INTERNATIONAL CORP.,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

BRIEF OF AMERICAN ARBITRATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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BRIEF OF AMERICAN ARBITRATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICUS CURIAE[1]

The American Arbitration Association ("AAA"), a non-profit public service organization, is the largest provider of alternative dispute resolution services in the world. Founded in 1926, the AAA has administered over 2 million domestic and

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[1] Pursuant to Supreme Court Rule 37, *amicus curiae* states that this brief has not been authored in whole or in part by counsel for a party in this case, and no entity other than the amicus or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk.

international disputes arising out of a wide variety of contracts and collective bargaining agreements. The AAA also conducts comprehensive training for arbitrators and mediators and provides programs and publications to educate the public and potential users of its services about various forms of alternative dispute resolution. The AAA has offices located throughout the United States, as well as in Ireland, Singapore, and Mexico. The AAA will open an office in Bahrain in the near future.

In response to this Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), the AAA developed and implemented a set of rules to govern class action arbitrations, known as the Supplementary Rules for Class Arbitration (the "Rules" or "Class Rules"). *See* Addendum A. The parties in this case agreed that the Rules would, in part, apply to their arbitration.[2]

The extensive use of the AAA's Class Rules in proceedings in which parties have sought class arbitration has given the AAA substantial experience with, and insight into, the conduct of class arbitrations. The AAA is thus singularly situated to offer this Court a perspective on the manner in which class arbitrations have evolved, how proceedings that are brought as class arbitrations are administered,

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[2] The AAA's various rules, including the Supplementary Rules for Class Arbitrations, are drafted in a manner that contemplates the AAA's active administration of the underlying arbitration. The arbitration proceedings in this case, however, proceeded *ad hoc*, without the supervision of the AAA or any arbitral institution.

and how the AAA and arbitrators administer and decide class action arbitrations. However, as a matter of policy, the AAA takes no position on the question whether an arbitration agreement that is silent on the availability of class arbitration should be interpreted to permit such arbitration.

INTRODUCTION AND SUMMARY OF ARGUMENT

While the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et. seq.*, is now over 80 years old, issues concerning the availability and administration of class action arbitrations under that statute came to the fore only in the past two decades, following a series of decisions from this Court enforcing the FAA's national policy in favor of arbitration. Of most relevance here, *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), marked the first time that this Court addressed the intersection of class actions and arbitration. In *Bazzle*, a majority of the Court concluded that whether an arbitration agreement permits or prohibits class arbitration should be decided by an arbitrator in the first instance as an issue of contract interpretation.

The AAA anticipated that some parties would likely view the Court's decision in *Bazzle* as an implicit endorsement of class arbitrations under the FAA when permitted by the parties' contract. The AAA therefore responded by developing a set of procedures to help arbitrators make the types of determinations that would be required in class action arbitrations. The AAA's first step was to assemble a committee of experts knowledgeable both about

arbitration and class actions to draft class arbitration rules for use in proceedings brought to the AAA as class arbitrations. The committee was balanced and diverse, and included individuals who represented both plaintiffs and defendants in class action proceedings. The Rules were the result of the committee's effort.

The Rules went into effect in October 2003. The goals of the Rules are (i) to provide a roadmap for the conduct of class action arbitrations where the underlying contract either expressly or as a matter of contract interpretation authorizes class arbitration (or where class arbitration is ordered by a court); (ii) to address significant fairness and due process concerns applicable to all sides, especially absent class members; and (iii) to balance the efficiencies and cost savings of arbitration with the need for an appropriate level of judicial oversight. The AAA's six years of experience with its Class Rules have given the AAA confidence that it has been successful in accomplishing those goals.

In adopting the Rules, the AAA's sole interest was to provide a fair, efficient, and effective mechanism for the resolution of class action arbitrations, to the extent that such arbitrations are permitted by the underlying contract. The AAA thus offers this *amicus curiae* brief to provide the Court an overview of its Class Rules and how class arbitrations are conducted under them. While the AAA takes no position on the question presented in this case, the AAA believes that this brief may help inform the Court's resolution of the question presented by providing background information

about the administration of class arbitrations generally and the processes that are available for resolving disputes pertaining to class issues.

ARGUMENT

I. THE AAA SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS PROVIDE A FRAMEWORK FOR THE RESOLUTION OF CLASS ACTION ARBITRATIONS.

A. The Emergence of Class Arbitration Issues Prior to Bazzle.

Class action arbitrations are a relatively recent phenomenon in the history of the FAA. Their roots are traceable to a line of decisions from this Court in the 1980s that gave effect to and invigorated the national policy, embodied in the FAA favoring arbitration and honoring private agreements to arbitrate rather than litigate disputes.

Of particular relevance to the development of class arbitrations was this Court's decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984). In *Keating*, this Court held that a state law prohibiting arbitration under franchise agreements was preempted by the FAA, even in state court. *Id.* at 16. More broadly, the Court's decision underscored that courts would respect and enforce arbitration provisions in agreements. "Contracts to arbitrate," the Court emphasized, "are not to be avoided by allowing one party to ignore the contract and resort

to the courts [because] "[s]uch a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Id.* at 7.

While the Court declined to address the propriety of the class arbitration ordered by the lower court, 465 U.S. at 9, *Keating* was part of a series of cases interpreting the FAA that unequivocally signaled judicial respect for, and deference to, contractual agreements to arbitrate. Other cases included *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 20 (1983); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636-637 (1985); and *Perry v. Thomas*, 482 U.S. 483, 490 (1987). Collectively, those precedents underscored that "Congress enacted the FAA to replace judicial indisposition to arbitration with a national policy favoring it." *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1402 (2008) (internal quotations omitted).

In response to these decisions, businesses began to incorporate arbitration clauses into their form contracts with other businesses and consumers. The increasing use of those clauses reflected, at least in part, an effort to obtain the benefits of arbitration that this Court had identified in its decisions giving an expansive interpretation to the FAA: avoiding costly and time-consuming litigation in the court system, and resolving disputes in an efficient and streamlined process. *Mitsubishi*, 473 U.S. at 628.

The greater prevalence of arbitration clauses in form contracts with large numbers of counterparties led, in turn, to the emergence of issues concerning the permissibility of class arbitrations. Because the FAA states that arbitrations must be conducted "in accordance with the terms of the agreement," 9 U.S.C. § 4, requests for class arbitration necessarily required resolution of a threshold question: whether the arbitration agreement even permitted class arbitration. If it did, then numerous secondary questions arose: how the class certification determination should be made, who should make it, and what tools are available to guide the decisionmaker in rendering such determinations within an arbitration proceeding. All of these questions were presented to judges and arbitrators with increasing frequency in the 1990s and the early part of this decade. *See, generally,* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will The Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 12 (2000); Allen S. Kaplinsky & Mark J. Levin, *Consumer Financial Services Arbitration: Current Trends And Developments*, 53 Bus. Lawyer 1075, 1080-81 (1998).[3]

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[3] A related issue that courts have addressed in the past decade, and which is the subject of continuing litigation and substantial controversy, is the enforceability of clauses in standard form agreements expressly prohibiting class action proceedings of any type. *See* note 8, *supra*.

B. Bazzle and the AAA's Response.

1. The Bazzle Decision

The only decision of this Court thus far to confront class arbitration issues is *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). The question presented to this Court in *Bazzle* was whether the FAA "prohibits class-action procedures from being superimposed on to an arbitration agreement that does not provide for class-action arbitration." *Bazzle* Cert. Pet. at i. The parties in *Bazzle*, however, disputed whether the arbitration agreement actually prohibited class arbitration or was simply silent on the point. *Bazzle*, 539 U.S. at 447 (plurality opinion).

As a result, the Court in *Bazzle* found it necessary to resolve, instead of the question presented, the predicate question of who should decide whether an agreement permits or prohibits class arbitration – an arbitrator or a court? A four-Justice plurality concluded that "whether [an arbitration agreement] forbids class arbitration . . . is for the arbitrator to decide" in the first instance, because that question relates to "what kind of arbitration proceeding the parties agreed to." 539 U.S. at 451-452. The plurality explained that ascertaining what kind of arbitration proceeding the parties agreed to "concerns contract interpretation and arbitration procedures[, which] [a]rbitrators are well situated to answer." *Id.* at 453. Because the lower court in *Bazzle*, rather than an arbitrator, had determined whether the agreement permitted or precluded class arbitration, the plurality voted to

remand the matter to permit the South Carolina Supreme Court to submit that determination to the arbitrator. *Id.* at 447, 454.

Justice Stevens stated that he would have affirmed the lower court decision holding that the agreement permitted class arbitration, but he joined the plurality's disposition in order to produce a majority judgment that the question of contract construction be remanded to the arbitrator. 539 U.S. at 455 (Stevens, J., concurring).

2. AAA's Response

Some lower courts (including the Second Circuit in this case) interpreted the Court's judgment in *Bazzle* as an implicit endorsement of the concept of class arbitrations, at least when the arbitration agreement does not expressly prohibit them. *See Shroyer* v. *New Cingular Wireless Servs.*, 498 F.3d 976, 991 (9th Cir. 2007); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 262 (Ill. 2006).

The AAA understood *Bazzle* to endorse the proposition that, under the FAA, class arbitrations are permissible where the parties' arbitration agreement is construed to permit class arbitration. Accordingly, to prepare for an anticipated increase in demand for the administration of class arbitrations, the AAA began shortly after *Bazzle* to develop new procedures designed specifically for such proceedings.

At the same time, however, the AAA was sensitive to the controversies surrounding class actions, both inside and outside the arbitral setting.

As a result, the AAA labored to ensure that the procedures it developed would neither favor nor disfavor the use of class arbitration, and the AAA adopted a position of neutrality on whether class arbitrations were wise or not. The AAA's primary interest was to ensure, to the extent possible, the availability of effective, fair, and efficient class arbitration procedures for parties whose agreements were construed to permit class proceedings, and thereby to assist arbitrators in carrying out the class arbitration-related functions with which they were tasked by this Court in *Bazzle* and by parties seeking class arbitration.

The record of pre-*Bazzle* arbitrations on which the AAA could draw in developing class arbitration procedures was thin. Prior to *Bazzle*, the AAA had administered only a small number of class arbitrations, and typically did so only when a class action was referred by a court to arbitration. *See, e.g., Lewis v. Prudential-Bache Securities, Inc.*, 225 Cal. Rptr. 69 (Cal. Ct. App. 1986).

Judicial discussion of the contours of class arbitrations also was minimal before *Bazzle*. In *Keating v. Superior Court*, 167 Cal. Rptr. 481 (Cal. Ct. App. 1980), an intermediate state court expressed the view that neither federal nor state law poses an "insurmountable obstacle to conducting an arbitration on a class-wide basis." *Id.* at 492. That court posited, however, that class certification decisions should be made by a court, not an arbitrator, and that class arbitrations would require

a heightened level of judicial oversight to protect the rights of absent class members. *Ibid.*[4] A state appellate court in Pennsylvania also subscribed to that position, concluding that, while the arbitration at issue there could proceed on a class-wide basis, substantial judicial supervision would be necessary. *See Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 (Pa. Super. 1991).

Accordingly, to assist in the development of class arbitration procedures after *Bazzle*, the AAA commissioned an expert drafting committee. The committee was well-balanced and reflected diverse perspectives. It was composed of representatives of the business community, as well representatives of the plaintiffs and the consumer litigation bar. A former judge and senior AAA officials also served on the committee.

Fairness, due process, and efficiency were the overriding objectives of the committee. The committee was acutely aware that the interests of absent class members had to be protected, as the state courts in *Keating* and *Dickler* had observed. The committee also was cognizant of the need for fairness to the respondent in the arbitration proceeding, given the costs of conducting a class arbitration and the large amounts of monetary

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[4] *Keating* eventually reached this Court as *Southland Corp. v. Keating*, *supra*, but (as indicated above) the Court did not reach the class arbitration issues on which the intermediate state court had opined. 465 U.S. at 9.

claims potentially at stake.[5] The committee concluded, however, that fairness to absent parties and the evenhanded protection of both sides could be achieved in the context of arbitration, while preserving many of the normal efficiencies and conveniences of that process. *Cf. Shroyer*, 498 F.3d at 991 ("There is no reason to believe that the principal consideration of judicial economy that underlies the class mechanism in Rule 23 would not operate similarly in the context of class arbitration."). Thus, the committee sought to craft class arbitration rules that did not contemplate extensive judicial oversight of the arbitration proceeding, in contrast to the model advocated by the state courts in *Keating* and *Dickler*. Indeed, in the AAA's view, that model had been cast into some doubt by this Court's decision in *Bazzle*.

C. The AAA Class Arbitration Rules Divide The Resolution Of Class Arbitration Issues Into Three Phases To Ensure Fairness And Efficiency.

The result of the committee's efforts was the adoption of the Class Rules, which became effective on October 8, 2003. The Rules divide the resolution of class arbitration issues into three distinct phases. The purpose of this structure is to ensure that the AAA's foundational goals of fairness and efficiency are accomplished in class arbitrations by providing

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[5] In *Bazzle*, the class award against the respondent was nearly $11 million. *Bazzle*, 539 U.S. at 449 (plurality opinion).

the parties the opportunity at stated intervals to seek judicial approval or disapproval of a decision by the arbitrator.[6]

In addition, the AAA believes that, to achieve the goals of fairness and efficiency, it is critical that arbitrators who preside over classwide arbitrations possess substantial experience with and an in-depth understanding of class action proceedings, as well as arbitration. Accordingly, arbitrators presiding over class arbitrations conducted under the Rules are appointed from a select national roster of experienced class action arbitrators. Rule 2(a), Addendum A at 2a.

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[6] The Class Rules apply when the parties' arbitration agreement provides for arbitration pursuant to any of the rules of the AAA, and when one of the parties submits a dispute to arbitration on behalf of or against a class or purported class. Rule 1(a), Addendum A at 1a. The Class Rules are intended to supplement, rather than supplant, other applicable rules that may apply in a proceeding. *Ibid.* In the event of inconsistencies between the Class Rules and other applicable rules, however, the Class Rules govern. Rule 1(b), Addendum A at 1a. Following the model of the Rules, the term "arbitrator" in this brief encompasses a panel of three arbitrators for proceedings in which the agreement of the parties calls for more than one arbitrator.

1. The Clause Construction Award Phase

The first phase under the Rules is the "Clause Construction Award" phase. This phase is designed to permit the arbitrator to fulfill the Court's directive in *Bazzle* by determining, "in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration award to proceed on behalf of or against a class." Rule 3, Addendum A at 2a. The Clause Construction Award determination must be made "as a threshold matter" at the outset of the arbitration, before the arbitrator determines any questions regarding class certification or the merits of the dispute. *Ibid.* In making this determination, the arbitrator seeks to effectuate the intent of the parties, as required by this Court's precedents governing the interpretation of arbitration agreements. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 34 (1991). To emphasize that the parties' selection of AAA Rules to govern their proceeding is not evidence bearing on whether the arbitration should be conducted on a class-wide basis, the Rules specify that, "[i]n construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules . . . to be a factor in either favor of or against permitting the arbitration to proceed on a class basis." Rule 3, Addendum A at 2a.[7]

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[7] The parties in the instant case agreed that Rules 3-7 of the AAA's Class Rules would govern their arbitration

As explained in the Commentary to the AAA's Policy on Class Arbitrations, the AAA will neither commence administration of an arbitration nor refer a matter to an arbitrator if the arbitration agreement contains a class waiver clause that "on its face prohibits class actions," unless a court has determined that the class action waiver is unenforceable, or if a court otherwise orders that the arbitrator determine the enforceability of the class action waiver. Commentary to AAA Policy on Class Arbitrations, Feb. 18, 2005 (attached as Addendum B at 15a).[8]

After the Clause Construction Award is rendered, the Rules require the arbitrator to stay proceedings for a period of at least thirty days to "permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award." Rule 3, Addendum A at 2a.[9] That automatic stay affords an opportunity for early

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proceeding. Pet. App. 56a. The arbitrators' determination that the agreement permitted class arbitration was made pursuant to Rule 3. *Id.* at 4a.

[8] The AAA adopted its policy of declining to accept requests for class arbitration when the agreement contains a waiver clause expressly prohibiting class proceedings because caselaw on the enforceability of such waivers of class action rights was – and remains – somewhat unsettled. *See* Commentary, Addendum B at 15a; *compare, e.g., Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000) (enforcing class action waiver clause), *with Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) (declining to enforce such a clause).

[9] The Petitioners in the instant case invoked the Rule 3 stay provision and sought judicial review of the arbitrator's Clause Construction Award. Pet. App. 52a.

judicial review of the arbitrator's decision on whether class arbitration is permitted under the arbitration agreement. The stay thus conserves resources by allowing a party to subject the Clause Construction Award to judicial scrutiny before further investment of time and resources in the arbitration proceeding. If a party informs the arbitrator that it has sought judicial review of the award after the 30-day period has lapsed, the arbitrator has the discretion to stay further proceedings until the arbitrator is informed of the ruling of the court. *Ibid.*

In crafting the provision for an automatic stay of the Clause Construction Award, the AAA relied on case law that permitted courts to confirm partial final arbitration awards under certain circumstances. *See, e.g. Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 2d 280 (2d Cir. 1986). The inclusion of the mandatory stay provision also drew on, but did not adopt entirely, the judicial oversight model proposed by the state courts in *Keating* and *Dickler* (the only judicial precedents on the administration of class arbitrations at the time the AAA was drafting the Rules). Early in the AAA's administration of class action arbitrations, parties expressed a positive reaction to the automatic stay, which they viewed as a safety valve in the class arbitration process. However, as the AAA and parties have become more familiar with class arbitration proceedings, the need for an automatic stay after the Clause Construction Award has been called into question by some who believe that it unnecessarily delays the arbitration process. As warranted by changes in arbitration law and developments in arbitration practice, the AAA makes periodic amendments to its various rules. In

assessing possible future changes to the Class Rules, the AAA will consider the continued need for the automatic stay following the Clause Construction Award.[10]

2. The Class Determination Award Phase

If the arbitrator decides that the arbitration clause permits a class action and after the stay following the Clause Construction Award has expired, the second phase under the Rules commences. In that second phase, the Class Determination Award phase, the arbitrator decides whether the matter should proceed as a class action. Rule 4(a), Addendum A at 5a.

The criteria to be applied by the arbitrator in making a Class Determination Award largely track the provisions of Rule 23 of the Federal Rules of Civil Procedure. The AAA decided to hew closely to Federal Rule 23 because of its protections of the due process rights of the parties and absent class

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[10] At least one federal appellate court has declined to exercise jurisdiction to review a Clause Construction Award under the stay provision, holding that the propriety of the arbitration panel's decision that the agreement permitted class arbitration was not ripe for review. *Dealer Computer Servs., Inc. v. Dub Herring Ford*, 547 F.3d 558, 562 (6th Cir. 2008). The court in that case noted, however, that the AAA's Class Rules provide "ample opportunity [later] to obtain judicial review . . . of the arbitration panel's prior Clause Construction Award." *Ibid.* The "ample opportunity" to which the court referred was the Class Rules' stay provision allowing judicial review following the second phase – the Class Determination Award, which is discussed in point 2, *infra*.

members, and because of the extensive body of case law under Rule 23 on which arbitrators could rely in making Class Determination Awards.

As is the case with judges under Federal Rule 23, arbitrators making a Class Determination Award must decide whether certain "prerequisites" to class treatment are met. Those prerequisites include the familiar Rule 23 factors of numerosity, commonality, typicality, and adequacy of representation and class counsel. Rule 4(a), Addendum A at 5a.

The Rules go further than Federal Rule 23(a) in one respect, however: the arbitrator may certify a class arbitration only if "each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members." Rule 4(a)(6), Addendum A at 5a. The inclusion of that provision seeks to ensure that each putative class member entered into the same arbitration agreement. That inquiry is necessary because commercial entities sometimes use different standard form contracts for different subsets of clients or customers. Class treatment under the Rules thus is authorized only if the differences in the arbitration clauses of the contracts are not material.

If those prerequisites are satisfied, the arbitrator must make additional determinations that mirror Federal Rule 23(b)(3)'s standards. Specifically, a class may be certified for arbitration only if (i) common issues of law or fact predominate over individual issues, and (ii) class arbitration would be a superior method for resolving the matter. Rule 4(b),

Addendum A at 5a. The factors to be considered in making those determinations echo Rule 23(b) by focusing on (i) the interest of putative class members in individually controlling separate arbitrations; (ii) the extent and nature of proceedings already commenced by or against the class members; (iii) the desirability of concentrating the resolution of claims in one tribunal; and (iv) the degree of difficulty in managing a class arbitration. *Ibid.*

The Class Determination Award must contain the arbitrator's findings with respect to the required elements for class certification. Rule 5(a), Addendum A at 6a. In addition, borrowing from Federal Rule 23(b)(3)'s "opt-out" provision, the Rules require that any Class Determination Award state how class members may be excluded from the class action, absent some exceptional circumstance that precludes permitting opt outs. Rule 5(c), Addendum A at 6a.

Like the Clause Construction Award stage, the Class Determination Award provision provides for a thirty-day automatic stay to allow a party or an intervening class member to seek a judicial order either confirming or setting aside the Class Determination Award. Rule 5(d), Addendum A at 7a. That provision is akin to the interlocutory appellate review of district court class certification decisions that is authorized by Rule 23(f).

If the arbitrator determines that class arbitration should proceed and after the 30 day stay for judicial review expires, the arbitration proceeds to the stage of providing notice to class members and administering exclusions from the class. The

particular details of the notice and exclusion process are specified in the Rules. Rule 6, Addendum A at 7a.

3. The Final Award Phase

After the notice to class members is issued and exclusions are addressed, the class arbitration moves to the merits phase, which will ultimately result in a Final Award. Rule 7, Addendum A at 9a. Whether favorable to the class or not, the Final Award must define the class with specificity, state to whom notice was sent, and identify who (if anyone) elected to exclude himself or herself from the class. *Ibid.* In addition, like Federal Rule 23, the Class Rules require arbitrator approval of any settlement or dismissal of a class action arbitration. Rule 8, Addendum A at 9a.

The presumption of confidentiality that applies to the majority of AAA arbitrations is abandoned for all phases of the proceedings under the Rules. Instead, the Rules provide that "[a]ll class arbitration hearings and filings may be made public, subject to the authority of the arbitrator to provide otherwise in special circumstances." Rule 9(a), Addendum A at 9a. The AAA determined that confidentiality was incompatible with the concept of class arbitration because of the large numbers of individuals – especially absent class members – potentially affected by class arbitration decisions. The AAA therefore adopted a policy of transparency, unprecedented in commercial arbitration, to ensure that all members of the putative class could fully monitor the proceedings. Accordingly, every class

arbitration administered by the AAA is posted on the class arbitration docket on the AAA's website (available at http://wwr.adr.org.sp.asp?id=28763). On that docket, the AAA posts the demand for arbitration, the identities of the parties, the names and contact information of counsel, all awards rendered in the case, and the date, time and place of any scheduled hearings. Rule 9(b), Addendum A at 10-11a. Very few objections to the lack of confidentiality have been raised by parties to proceedings under the Rules. Indeed, in only a few instances have parties requested, and arbitrators agreed, to refrain from posting certain information that otherwise would have been made available.

The AAA's response to this Court's directive in *Bazzle* generally has been seen as positive. One scholar has described the Rules as a "useful quasi-hybrid model" that combines arbitrator autonomy with a laudable opportunity for judicial oversight at phases 1 and 2 of the process. *See* S. I. Strong, *Enforcing Class Arbitration In The International Sphere: Due Process And Public Policy Concerns*, 30 U. Pa. J. Int'l L. 1, 41 (2008). The same author also noted that the Rules "create a useful record and procedural guideline" that facilitates judicial review, while "minimiz[ing] expenditures of time, money, and effort," and limiting delays and obstructions in class arbitration proceedings. *Id.* at 41, 42.

D. A Statistical Overview Of Arbitrations Administered By The AAA Under its Class Rules.

The AAA provides the following statistical overview of arbitrations administered under the AAA's Class Rules.

In the nearly six years that the Class Rules have been in effect, the AAA has administered 283 class arbitrations, 121 of which remain active.

Of the 283 class arbitrations, 135 have resulted in Clause Construction Awards. Of those 135:

- 95 (70%) held that the arbitration clause permitted the arbitration to proceed on behalf of a class.
- 7 (5%) held that the arbitration clause did not permit the arbitration to proceed on behalf of a class.
- 33 (24%) involved stipulations among the claimants and the respondents that the underlying arbitration agreement permitted the arbitration to proceed on behalf of a class.

Of the cases permitted to proceed beyond the Clause Construction Award, 48 have resulted in Class Determination Awards. Of those:

- 24 (50%) granted class certification.
- 18 (38%) denied certification.
- 6 (13%) were resolved by stipulations among the parties to certify a class.

So far, no class arbitration conducted under the Rules has resulted in a final award on the merits, although one such award is imminent. However, 162 cases commenced as class arbitrations have been settled, withdrawn, or dismissed. At the time they were settled, withdrawn, or dismissed:

- 97 (60%) were in the Pre-Clause Construction Award Phase.
- 40 (25%) were in the Post-Clause Construction/Pre-Class Determination Award Phase.
- 23 (14%) were in the Post-Class Determination Award Phase.
- 2 (1%) were consolidated into other class arbitrations.

Furthermore, to the AAA's knowledge:

- 38 (17%) of the 228 cases where the arbitrator has been appointed have proceeded with three arbitrators. In 190 of the 228 cases, the arbitration proceeded with a single arbitrator.
- 81 (28%) of the arbitrations can be categorized as business versus business disputes. Those break down as follows:

Franchise	21	7%
Healthcare	20	7%
Financial Services	9	3%
Other	31	11%

- The remaining 196 cases (69%) can be categorized as disputes between businesses and consumers or employees. Those break down as follows:

Consumer	106	37%
Employment	96	34%

Overall, the median time from the filing of an arbitration to the Clause Construction Award is 281 days and a mean of 313 days. The median time from the Clause Construction Award to the Class Determination Award is 416 days and a mean of 501 days.

For all 162 closed cases, the median time frame from filing to settlement, withdrawal, or dismissal is 583 days with a mean of 630 days.

All told, these statistics suggest that class arbitration proceedings take more time than the average commercial arbitration, but may take less time than the average class action in court.

CONCLUSION

While the AAA takes no position on the legal question presented, the AAA's substantial experience under the Class Rules indicates that they have achieved their stated goals of responding to this Court's decision in *Bazzle* by providing guidance to the parties and arbitrators, and a fair, balanced, and efficient means of resolving class disputes.

Respectfully submitted,

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ADDENDUM

ADDENDUM TO AMICUS CURIAE BRIEF OF THE AMERICAN ARBITRATION ASSOCIATION

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ADDENDUM A

AAA Supplementary Rules for Class Arbitrations

Effective Date October 8, 2003

1. Applicability

(a) These Supplementary Rules for Class Arbitrations ("Supplementary Rules") shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association ("AAA") where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules. These Supplementary Rules shall also apply whenever a court refers a matter pleaded as a class action to the AAA for administration, or when a party to a pending AAA arbitration asserts new claims on behalf of or against a class or purported class.

(b) Where inconsistencies exist between these Supplementary Rules and other AAA rules that apply to the dispute, these Supplementary Rules will govern. The arbitrator shall have the authority to resolve any inconsistency between any agreement of the parties and these Supplementary Rules, and in doing so shall endeavor to avoid any prejudice to the

interests of absent members of a class or purported class.

(c) Whenever a court has, by order, addressed and resolved any matter that would otherwise be decided by an arbitrator under these Supplementary Rules, the arbitrator shall follow the order of the court.

2. Class Arbitration Roster and Number of Arbitrators

(a) In any arbitration conducted pursuant to these Supplementary Rules, at least one of the arbitrators shall be appointed from the AAA's national roster of class arbitration arbitrators.

(b) If the parties cannot agree upon the number of arbitrators to be appointed, the dispute shall be heard by a sole arbitrator unless the AAA, in its discretion, directs that three arbitrators be appointed. As used in these Supplementary Rules, the term "arbitrator" includes both one and three arbitrators.

3. Construction of the Arbitration Clause

Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration

clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award"). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.

In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.

4. Class Certification

(a) Prerequisites to a Class Arbitration

If the arbitrator is satisfied that the arbitration clause permits the arbitration to proceed as a class

arbitration, as provided in Rule 3, or where a court has ordered that an arbitrator determine whether a class arbitration may be maintained, the arbitrator shall determine whether the arbitration should proceed as a class arbitration. For that purpose, the arbitrator shall consider the criteria enumerated in this Rule 4 and any law or agreement of the parties the arbitrator determines applies to the arbitration. In doing so, the arbitrator shall determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described. The arbitrator shall permit a representative to do so only if each of the following conditions is met:

(1) the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately protect the interests of the class;

(5) counsel selected to represent the class will fairly and adequately protect the interests of the class; and

(6) each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.

(b) Class Arbitrations Maintainable

An arbitration may be maintained as a class arbitration if the prerequisites of subdivision (a) are satisfied, and in addition, the arbitrator finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(1) the interest of members of the class in individually controlling the prosecution or defense of separate arbitrations;

(2) the extent and nature of any other proceedings concerning the controversy already commenced by or against members of the class;

(3) the desirability or undesirability of concentrating the determination of the claims in a single arbitral forum; and

(4) the difficulties likely to be encountered in the management of a class arbitration.

5. Class Determination Award

(a) The arbitrator's determination concerning whether an arbitration should proceed as a class arbitration shall be set forth in a reasoned, partial final award (the "Class Determination Award"), which shall address each of the matters set forth in Rule 4.

(b) A Class Determination Award certifying a class arbitration shall define the class, identify the class representative(s) and counsel, and shall set forth the class claims, issues, or defenses. A copy of the proposed Notice of Class Determination (see Rule 6), specifying the intended mode of delivery of the Notice to the class members, shall be attached to the award.

(c) The Class Determination Award shall state when and how members of the class may be excluded from the class arbitration. If an arbitrator concludes that some exceptional circumstance, such as the need to resolve claims seeking injunctive relief or claims to a limited fund, makes it inappropriate to allow class members to request exclusion, the Class Determination Award shall explain the reasons for that conclusion.

(d) The arbitrator shall stay all proceedings

following the issuance of the Class Determination Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Class Determination Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Class Determination Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Class Determination Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.

(e) A Class Determination Award may be altered or amended by the arbitrator before a final award is rendered.

6. Notice of Class Determination

(a) In any arbitration administered under these Supplementary Rules, the arbitrator shall, after expiration of the stay following the Class Determination Award, direct that class members be provided the best notice practicable under the circumstances (the "Notice of Class Determination"). The Notice of Class Determination shall be given to all members who can be identified through reasonable effort.

(b) The Notice of Class Determination must

concisely and clearly state in plain, easily understood language:

(1) the nature of the action;

(2) the definition of the class certified;

(3) the class claims, issues, or defenses;

(4) that a class member may enter an appearance through counsel if the member so desires, and that any class member may attend the hearings;

(5) that the arbitrator will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded;

(6) the binding effect of a class judgment on class members;

(7) the identity and biographical information about the arbitrator, the class representative(s) and class counsel that have been approved by the arbitrator to represent the class; and

(8) how and to whom a class member may communicate about the class arbitration, including information about the AAA Class Arbitration Docket (see Rule 9).

7. Final Award

The final award on the merits in a class arbitration, whether or not favorable to the class, shall be reasoned and shall define the class with specificity. The final award shall also specify or describe those to whom the notice provided in Rule 6 was directed, those the arbitrator finds to be members of the class, and those who have elected to opt out of the class.

8. Settlement, Voluntary Dismissal, or Compromise

(a) (1) Any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of an arbitration filed as a class arbitration shall not be effective unless approved by the arbitrator.

(2) The arbitrator must direct that notice be provided in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(3) The arbitrator may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(b) The parties seeking approval of a settlement,

voluntary dismissal, or compromise under this Rule must submit to the arbitrator any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(c) The arbitrator may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(d) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires approval under this Rule. Such an objection may be withdrawn only with the approval of the arbitrator.

9. Confidentiality; Class Arbitration Docket

(a) The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations. All class arbitration hearings and filings may be made public, subject to the authority of the arbitrator to provide otherwise in special circumstances. However, in no event shall class members, or their individual counsel, if any, be excluded from the arbitration hearings.

(b) The AAA shall maintain on its Web site a Class Arbitration Docket of arbitrations filed as class arbitrations. The Class Arbitration Docket will provide certain information about the arbitration to

the extent known to the AAA, including:

(1) a copy of the demand for arbitration;

(2) the identities of the parties;

(3) the names and contact information of counsel for each party;

(4) a list of awards made in the arbitration by the arbitrator; and

(5) the date, time and place of any scheduled hearings.

10. Form and Publication of Awards

(a) Any award rendered under these Supplementary Rules shall be in writing, shall be signed by the arbitrator or a majority of the arbitrators, and shall provide reasons for the award.

(b) All awards rendered under these Supplementary Rules shall be publicly available, on a cost basis.

11. Administrative Fees and Suspension for Nonpayment

(a) A preliminary filing fee of $3,250 is payable in full by a party making a demand for treatment of a claim, counterclaim, or additional claim as a class arbitration. The preliminary filing fee shall cover all AAA administrative fees through the rendering of the Clause Construction Award. If the arbitrator determines that the arbitration shall proceed beyond the Clause Construction Award, a supplemental filing fee shall be paid by the requesting party. The supplemental filing fee shall be calculated based on the amount claimed in the class arbitration and in accordance with the fee schedule contained in the AAA's Commercial Arbitration Rules.

(b) Disputes regarding the parties' obligation to pay administrative fees or arbitrator's compensation pursuant to applicable law or the parties' agreement may be determined by the arbitrator. Upon the joint application of the parties, however, an arbitrator other than the arbitrator appointed to decide the merits of the arbitration, shall be appointed by the AAA to render a partial final award solely related to any disputes regarding the parties' obligations to pay administrative fees or arbitrator's compensation.

(c) If an invoice for arbitrator compensation or administrative charges has not been paid in full, the AAA may so inform the parties in order that one of them may advance the required deposit. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

(d) If an arbitration conducted pursuant to these Supplementary Rules is suspended for nonpayment, a notice that the case has been suspended shall be published on the AAA's Class Arbitration Docket.

12. Applications to Court and Exclusion of Liability

(a) No judicial proceeding initiated by a party relating to a class arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a class arbitration or potential class arbitration under these Supplementary Rules is a necessary or proper party in or to judicial proceedings relating to the arbitration. It is the policy of the AAA to comply with any order of a court directed to the parties to an arbitration or with respect to the conduct of an arbitration, whether or not the AAA is named as a party to the judicial proceeding in which the order is issued.

(c) Parties to a class arbitration under these Supplementary Rules shall be deemed to have consented that judgment upon each of the awards rendered in the arbitration may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these Supplementary Rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action seeking damages or injunctive relief for any act or omission in connection with any arbitration under these Supplementary Rules.

ADDENDUM B

AAA Policy on Class Arbitrations
(July 14, 2005)

On October 8, 2003, in response to the ruling of the United States Supreme Court in Green Tree Financial Corp. v. Bazzle, the American Arbitration Association issued its Supplementary Rules for Class Arbitrations to govern proceedings brought as class arbitrations. In Bazzle, the Court held that, where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted. Accordingly, the American Arbitration Association will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.

The Association is not currently accepting for administration demands for class arbitration where the underlying agreement prohibits class claims, consolidation or joinder, unless an order of a court directs the parties to the underlying dispute to submit any aspect of their dispute involving class claims, consolidation, joinder or the enforceability of

such provisions, to an arbitrator or to the Association.

Commentary to the American Arbitration Association's Policy on Class Arbitrations (February 18, 2005)

It has been the practice of the American Arbitration Association since its Supplementary Rules for Class Arbitrations were first enacted to require a party seeking to bring a class arbitration under an agreement that on its face prohibits class actions to first seek court guidance as to whether a class arbitration may be brought under such an agreement. The Association's practice has been neither to commence administration of a case nor to refer such a matter to an arbitrator until a court decides that it is appropriate to do so. The Association's determination not to administer class arbitrations where the underlying arbitration agreement explicitly precludes class procedures was made because the law on the enforceability of class action waivers was unsettled; the Association takes no position as to whether such clauses are or should be enforceable.

In a recent review of this practice by the Association's Executive Committee it was agreed that this practice should be maintained in light of the continued unsettled state of the law. Courts in different states and different federal circuits have reached differing conclusions concerning the preclusion of class actions by agreement and "gateway" issues generally. However, the courts that

have confronted the question have generally concluded that the decision as to whether an agreement that prohibits class actions is enforceable is one for the courts to make, not the arbitrator. In fidelity to its Due Process Protocols, the Association will continue to require all proceedings brought to it for administration to meet the standards of fairness and due process set forth in those protocols, but the Association will not seek to make decisions concerning class action agreements that the courts appear to have reserved for themselves.

The Executive Committee also determined at the same meeting to proceed forthwith in the creation of a special committee to explore the possibility of identifying counsel who could assist parties who cannot afford to pay for an attorney in arbitral proceedings. This effort would supplement the Association's current ability to provide arbitrators who will serve pro bono, or for a reduced fee, in appropriate cases.

The Association will continue to monitor developments in this rapidly evolving intersection of arbitration and the courts .

AMICUS CURIAE BRIEF

No. 08-1198

IN THE

Supreme Court of the United States

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL US, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AND AARP AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTEREST OF AMICI CURIAE

The American Association for Justice ("AAJ") and AARP respectfully submit this brief as *amici curiae*.[1] The parties have filed letters of consent to the filing of amicus briefs.

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil actions. AAJ's mission includes the development of the law providing redress for wrongful injury, not only to provide compensation for the victims of misconduct, but also to deter such misconduct at the outset. An important issue in this case is the validity of "agreements" that require claimants—even those whose claims are too small to be pursued individually—to resolve disputes one at a time. Whether this requirement arises from interpretation of a contract that is silent on the matter, or from an explicit waiver of collective actions, AAJ is concerned that such requirements are a practical barrier to the vindication of important rights.

AARP is a non-partisan, non-profit organization with nearly 40 million members, dedicated to addressing the needs and interests of people aged 50 and older. As the largest membership organization serving older people, AARP is greatly concerned about widespread fraudulent, deceptive, and unfair practices perpetrated against consumers in a broad

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

range of transactions because many of such practices have a disproportionate impact on older people. AARP also advocates on behalf of employment rights for older people. AARP thus supports laws and public policies designed to protect and preserve the legal means for them to seek redress when older persons are harmed in the consumer and employment marketplace. Among these activities, AARP advocates for improved access to the civil justice system for people with small claims or seeking to enforce important civil and statutory rights, and supports the availability of the full range of enforcement tools, including class actions. AARP has filed *amicus curiae* briefs in this Court, federal appellate courts, and state supreme and appeals courts, addressing the importance of preserving court access to the full range of redress that Congress and state legislatures enacted for the protection of consumers and employees, especially those with relatively small amounts in dispute or seeking to enforce important civil and statutory rights.

SUMMARY OF THE ARGUMENT

1. a. Although the contract at issue in this case is silent regarding arbitrations on a class basis, the contracts consumers, employees and small businesses most frequently enter into often contain provisions that explicitly prohibit any arbitration or litigation of aggregated claims. Such "collective action waivers" were developed by attorneys for franchisors, credit card companies, wireless phone service providers, and other corporate entities fearful of large class action verdicts. They have little to do with agreements to arbitrate—in fact they ban all types of arbitration except for individual claims. Nevertheless, they are inserted into arbitration

agreements in an effort to take advantage of the policy favoring their enforcement.

Collective action waivers do not explicitly deprive individuals of all legal recourse for corporate wrongdoing. But that is their practical effect for those individuals with small claims, because of the economic realities of arbitration.

b. Arbitration is costly for individuals, particularly in view of the filing fees paid to private arbitration companies and the hourly fees and expenses paid to private arbitrators, which must be paid in advance. In the case of small claims, the costs can greatly outweigh any potential recovery. In the civil justice system, class actions serve to make small claims economically viable by aggregating them, thereby spreading the costs and attracting competent counsel. Requiring arbitration of disputes individually makes them economically infeasible. In effect, such contractual requirements serve as exculpatory clauses, guaranteeing that even intentional misconduct that enriches a company by taking small amounts from numerous consumers will result in little or no accountability.

c. Increasingly, courts have held collective action waivers to be unconscionable and thus unenforceable under state law. Specifically, those decisions hold that such provisions are not invalid per se, but, where claimants can prove they preclude the vindication of important rights, they violate public policy. Courts have so held based on facts showing that the cost of arbitrating an individual's claim would be prohibitive in relation to the potential recovery, that competent attorneys are unable or unwilling to undertake representation of such

individual claims, and that very few individuals have actually pursued such claims.

2. Contrary to the assertions of *amici* supporting Petitioners in this case, the decisions invalidating collective action waivers comport both with the Federal Arbitration Act and with the federal policy favoring arbitration.

a. Contract provisions prohibiting class arbitrations are not enforceable under § 2 of the FAA because they are not provisions to settle a controversy by arbitration. They are provisions against arbitration. The statute does not limit arbitrations to individual resolutions and this Court has indicated that collective arbitrations are not inconsistent with the FAA.

b. Even if collective action waivers fall within the scope of § 2, the Act specifically provides for non-enforcement on the basis of generally applicable state law. The defense of unconscionability has long been widely recognized and applied to contracts generally, as has the doctrine that contract terms that violate public policy shall not be enforced. The argument that courts apply these general rules of law more aggressively against arbitration agreements is wholly speculative and calls for unacceptable interference in the role of state courts to declare state law.

c. The growing body of decisional law invalidating collective action waivers is not only well within the limits placed on state law by the FAA, it also comports with federal arbitrability principles enunciated by this Court. Agreements to arbitrate claims involving violation of important statutory

rights may be enforced where the shift from the judicial forum to arbitral one does not result in the loss of substantive rights. Courts may withhold enforcement, however, where the provision effectively prevents the party from vindicating his or her statutory rights in the arbitral forum. This is precisely the case with respect to collective action waivers in disputes involving small claims, and this Court should reject any attempts to transform them into legitimate arbitration agreements.

ARGUMENT

I. CONTRACT PROVISIONS BANNING RESOLUTION OF DISPUTES ON A CLASS BASIS MAY BE HELD UNENFORCEABLE IF FOUND TO PREVENT PARTIES FROM VINDICATING IMPORTANT CONSUMER AND EMPLOYEE RIGHTS

A. Collective Action Waivers Have Become a Widespread Feature of Consumer and Employment Contracts for Most Americans.

The arbitration agreement at issue in this case is silent with respect to the arbitration of the aggregated identical claims of a class of contract parties. Although such silence in agreements presents unresolved legal issues, it has become increasingly rare in the contracts entered into by most Americans. It is far more typical that individuals who buy from, work for, or have other dealings with large corporations find themselves presented with standard contracts that not only require arbitration of claims against the company, but also required that claims be arbitrated

individually. Commonly, such "collective action waivers" preclude class arbitrations or the consolidation of similar, or even identical claims.

A representative contract provision of this type reads as follows:

> You agree that, by entering into this Agreement, you and Cingular are waiving the right to a trial by jury . . . . You and Cingular agree that YOU AND CINGULAR MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding. Further, you agree that the arbitrator may not consolidate proceedings [on] more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding, and that . . . if this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void.

Scott v. Cingular Wireless, 161 P.3d 1000, 1003 n.2 (Wash. 2007). *See also Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1215-16 (9th Cir. 2008) and *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 91-93 (N.J. 2006) (setting forth other examples of contract provisions banning class actions and class arbitrations).

Provisions such as these are fairly recent. They were devised in the 1990s in response to class action

lawsuits by small business franchisees against franchisors. *See* Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141, 142 (1997). Corporate counsel for credit card companies, electronics manufacturers, wireless service providers, often working cooperatively in secret, devised ever more broadly worded collective action "waivers," inserted into contracts that few consumers would read or understand. Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 395-99 (2005).[2]

On its face, such provisions do not abolish the consumer's remedy. It merely requires a company's thousands or even millions of customers who entered into identical contracts to pursue their grievances under the contract one at a time. In practice, the drafters were confident that few would actually do so. As one corporate counsel for an early adopter of such waivers advised, a franchisor "should be able to require each franchisee in the potential class to pursue individual claims in a separate arbitration. Since many (and perhaps most) of the putative class members may never do that, . . . an arbitration clause should enable the franchisor to dramatically reduce its aggregate exposure." Dunham, *supra*, at 142.[3] That is, as one early critic recognized, they

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[2] Professor Gilles coined the term "collective action waiver" to refer to broad contractual "agreements" to waive "not only the right to participate in class actions, but also the right to participate in classwide arbitrations or to aggregate claims with others in any form of judicial or arbitral proceeding." *Id.* at 376 n.15.

[3] This forecast proved correct. For example, in the first two years in which its contracts featured mandatory

were not designed to reduce transaction costs, but to increase those costs to the consumer and thereby discourage valid claims. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U.L.Q. 673, 683 (1996). Judge Richard Posner memorably explained: "The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

Collective action waivers are not agreements to arbitrate; quite the contrary. Nevertheless, the corporate lawyers who created them "wrapped their newborn in the cloak of an arbitration clause, protecting it against attack with the now-sacrosanct policies of the FAA." Gilles, *supra*, at 396. As another scholar observed, the clauses were inserted into broad arbitration agreements by "overzealous drafters" who hoped that "the courts' enthusiasm for enforcing arbitration clauses would spill over onto the logically separable remedy limitation, one that would have had no chance of enforcement without the arbitration clause." David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 49-50 (2003).

Initial enforcement by the courts led to ever-wider use of ever more aggressive waivers. Presently, "[t]he

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arbitration clauses, credit card issuer First USA filed 51,622 arbitration claims against card users, while only four consumers made a claim against the company. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1655 (2005).

outright banning of class action in mandatory arbitration clauses has become a standard policy for many corporations that transact with consumers." Bryan Allen Rice, *Comment, Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standard*," 45 HOUS. L. REV. 215, 224 (2008). Professor Sternlight correctly describes this phenomenon as "do it yourself" law reform that needs no yea vote from elected lawmakers. Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 11 (2000).

These provisions are not designed to simply move disputes from the judicial to the arbitral forum with no loss of substantive rights, as the FAA was designed to encourage. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *Shearson/American Express v. McMahon*, 482 U.S. 220, 232 (1987). Instead, their purpose is to immunize corporate defendants from any liability or accountability for wrongdoing by preventing potential victims from seeking redress either in court or before an arbitrator. They succeed at this because of the economic realities of arbitration.

B. Contract Provisions Prohibiting Class Litigation and Class Arbitration Create Immunity for Wrongdoers and Prevent Victims from Vindicating Their Statutory Rights.

Reacting against a wave of decisions upholding consumer rights, *amici* supporting Petitioner urge this Court to reach beyond the Question Presented in this case and take a position in support of such

collective action waivers. Essentially, they argue that the FAA favors only one-at-a-time arbitration. This Court should reject that suggestion.

The civil justice system, for all its virtues, can be dauntingly expensive for individuals and small businesses. The fee for one's own attorney, the cost of obtaining expert opinions, and other expenses would place justice out of reach of most people if they were required to finance their cases unaided.

Where there exists the potential for a substantial recovery, such as in cases involving serious personal injury, the plaintiff's attorney can facilitate access to the civil justice system by advancing those costs and agreeing to be paid on a contingency fee basis. *See* Stuart M. Speiser, LAWSUIT 560-63 (1980) (discussing the economics of preparing a high-value tort case).

As one state court recently observed: "Contingency fee agreements serve an important function in American life. Such agreements permit persons of ordinary means access to a legal system which can sometimes demand extraordinary expense." *In re Estate of Johnson*, 899 N.E.2d 198, 203 (Ohio Ct. App. 2008) (citation omitted). For that reason, the contingency fee is often called the "key to the courthouse door," enabling ordinary Americans "to pursue their claims with competent counsel." *Cross v. American Country Ins. Co.*, 875 F.2d 625, 629 (7th Cir. 1989).

But where an individual's potential recovery is less than the likely cost of obtaining it, pursuing a civil action is economically infeasible, both for the plaintiff and the plaintiff's attorney. This Court has recognized that the aggregation of small claims in a

single action makes representation by competent counsel possible.

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997), quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) (finding in a case involving small damages, "[e]conomic reality dictates that [a plaintiff's] suit proceed as a class action or not at all.").

The same holds true with respect to the arbitration of small claims. Despite hopeful expectations that "allow[ing] parties to avoid the costs of litigation" would benefit the individual whose claim "involves smaller sums of money," *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001), the reality has been that many consumers, employees, and small businesses have found arbitration of their claims prohibitively expensive. A study described as "the first comprehensive collection of information on arbitration costs," found that under the contracts that consumers and employees most often enter into, "[t]he cost to a plaintiff of initiating an arbitration is almost always higher than the cost of instituting a lawsuit." Public Citizen, *The Costs of*

Arbitration, at 1 (2002), http://www.citizen.org/documents/ACF110A.PDF.

Not only does arbitration not reduce transaction costs in most types of cases, it adds a substantial filing fee paid to an arbitration provider, such as the American Arbitration Association, as well as an hourly fee plus expenses paid to the arbitrator. *Id.* at 2-3.

A critical factor limiting access to justice is not simply the overall cost of arbitration, but the fact that much of it must be paid in advance. Even people with substantial claims may find that mounting fees make arbitration of their dispute unaffordable.[4] Public Citizen's study concluded that the costs of resolving consumer disputes in arbitration "have a deterrent effect, often preventing a claimant from even filing a case." *Id.* at 1. Many others, confronted by increasing costs and fees, "are forced to drop their claims." *Id.* at 5. Those findings are confirmed by other observers. *See* National Consumer Law Center, CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS §1.3.6, at 9 (4th

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[4] For example, in *Olshan Foundation Repair Co. v. Ayala*, 180 S.W.3d 212 (Tex. App. 2005), plaintiffs alleged that the foundation installed by defendant had failed. The plaintiffs paid a $4,130 fee to file their claim with the American Arbitration Association, as required by their contract. The AAA then submitted an invoice seeking immediate payment of $33,150 as plaintiffs' share of the arbitrator's fee. Not only did this amount to 28 percent of the Ayalas' combined annual gross income, it greatly exceeded the $22,650 that they had paid for the work. The court concluded that the arbitration clause was unconscionable and unenforceable under Texas law. *Id.* at 216.

ed. 2004) (High arbitration costs "favor companies and hurt consumers by deterring valid claims."); Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133, 161 (2004). ("The costs of arbitration can be so high that they deny consumers access to a forum in which to air their disputes.").

As is true in the civil justice system, a practical way to preserve the individual's ability to seek redress for small claims is to allow the aggregation of similar claims for resolution in a class arbitration. For that reason, scholars have warned that the growing reliance on contract provisions prohibiting class arbitration carries great potential for abuse and overreaching. *See, e.g.*, 3 Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS, § 9:67 n.2 (4th ed. 2008) ("The bar on class arbitration threatens the premise that arbitration can be a fair and adequate mechanism for enforcing statutory rights."); Gilles, *supra*, at 378 (arguing that "sound public policy requires collective litigation be available for small-claim plaintiffs who would not have the incentive or resources to remedy harms or deter wrongdoing in one-on-one proceedings"); J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1770 (2006) (urging non-enforcement of class action waivers "where such waivers have the practical effect of extinguishing individual claims.").

A growing number of courts have similarly concluded that collective action waivers are unconscionable and therefore unenforceable under state law where, due to the cost of individual arbitrations of small claims, the provisions operate

as exculpatory clauses and effectively prevent individuals from vindicating their statutory rights.

See, e.g., Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. Sup. Ct. 2005) (holding unconscionable an arbitration clause in credit card contract where it was alleged that the party with superior bargaining power had carried out a scheme to deliberately cheat large numbers of consumers out of small sums); *Powertel, Inc. v. Bexley*, 743 So.2d 570, 576 (Fla. Dist. Ct. App. 1999) (clause prohibiting class action "effectively insulates Powertel from liability under state consumer laws" and is therefore substantively unconscionable); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 262 (Ill. 2006) (where the purpose is to insulate the company from potential liability, "the class action waiver is unconscionable and unenforceable"); *Woods v. QC Financial Services*, 280 S.W.3d 90, 97 & 98 (Mo. App. 2008) (payday lender's contract provision precluding class arbitration "reduces the possibility of attracting competent counsel" and, by individualizing claims "absolutely and completely insulates and immunizes Appellant from scrutiny and accountability for its business practices."); *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 99, 101 (N.J. 2006) (provision precluding arbitration on a class basis effectively shielded payday lender from state statutory consumer protections and was thus unconscionable and unenforceable); *Fiser v. Dell Comp. Corp.*, 188 P.3d 1215, 1221 (N.M. 2008) (enforcement of class action ban "would be tantamount to allowing Defendant to unilaterally exempt itself" from state consumer protection law); *McNulty v. H & R Block*, 843 A.2d 1267, 1273-74 (Pa. Super. Ct. 2004) (tax preparer's ban on class arbitration required each individual to pay $50 filing

fee to resolve claim of $37; "When . . . clauses like this are used as a sword to strike down access to justice instead of a shield against prohibitive costs, we must defer to the overriding principle of access to justice."); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1008 (Wash. 2007) (clause which "prevents the use of arbitration to vindicate a broad range of [Consumer Protection Act] rights" was unenforceable as substantively unconscionable under Washington law); *Dunlap v. Berger*, 567 S.E.2d 265, 280 (W. Va. 2002) (clause prohibiting class arbitrations was unconscionable where it would "prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law.").

Federal courts applying state law of unconscionability include *Kristian v. Comcast Corp.*, 446 F.3d 25, 61 (1st Cir. 2006) (Applying Massachusetts law, "If the class mechanism prohibition here is enforced, Comcast will be essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law" and "the social goals of federal and state antitrust laws will be frustrated because of the 'enforcement gap' created by the de facto liability shield."); *Homa v. American Express Co.*, 558 F.3d 225, 230 (3rd Cir. 2009) (credit card agreement that precluded class action for violation of state Consumer Fraud Act "violates the fundamental public policy of New Jersey"); *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1219 (9th Cir. 2008) (class action waiver in cellular telephone contract unconscionable under Washington law); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 984

(9th Cir. 2007) (class action waiver in cellular phone contract unconscionable under California law); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) (cable provider's arbitration clause and class action waiver unconscionable under Georgia law because subscribers are left without adequate remedies); *Caban v. J.P. Morgan Chase & Co.*, 606 F.Supp.2d 1361, 1368-72 (S.D. Fla. 2009) (class action waiver unenforceable under Delaware law where small claims required arbitration on a class basis); *Coneff v. AT & T Corp.*, 620 F.Supp.2d 1248, 1259 (W.D. Wash. 2009) (wireless provider's class action waiver provision unconscionable under Washington law because without a class action, the vast majority of customers would never obtain justice).

Reacting against this wave of decisions upholding consumer rights, *amici* supporting Petitioner urge this Court to reach beyond the Question Presented and hold that the federal policy favoring arbitration encompasses only one-at-a-time arbitrations and that state laws permitting arbitration on a class basis are displaced by the Federal Arbitration Act. *See* CTIA-The Wireless Association Br. 9 (If arbitration agreements "can be interpreted to permit class arbitration . . . in furtherance of a state policy favoring class actions . . . [t]hat result would be inimical to the federal policy favoring arbitration."); DRI Br. 12-26 (class arbitrations are fundamentally different from individual arbitrations and lack procedural due process protections for corporate defendants); Chamber of Commerce Br. 19 ("[T]he FAA mandates displacement not only of rules that keep parties out of arbitration altogether, but also of arbitration-specific rules that allow arbitration to proceed . . . in ways contrary to the parties' intent.");

Pacific Legal Foundation Br. 7 (The "right to choose how to resolve disputes" is paramount over public policy goals). Clearly those *amici* would have this Court cast doubt on those cases invalidating express contractual "agreements" to arbitrate only on an individual basis.

We submit to the contrary, that the growing body of decisional law preserving the individual's access to a forum to vindicate important rights is consonant with the FAA and this Court's arbitration decisions.

C. Collective Action Waiver May Be Held Non-Enforceable Under State Law Based on Factual Inquiry Into Its Impact As A Barrier to the Vindication of Important Rights.

This Court has already declined to bestow a blanket imprimatur on collective action waiver provisions. The Court in *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000), stated that "the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. . . . [and] render it unenforceable." *Id.* at 90-91. The Court added, however, that when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id.* at 92. In *Randolph*, the record contained "hardly any information on the matter" so that plaintiff's allegations were "too speculative to justify the

invalidation of an arbitration agreement." *Id.* at 90-91.[5]

Following this Court's lead in *Randolph*, no court has held collective action waivers unenforceable per se. *See, e.g., Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 62 (1st Cir. 2007) (declining an invitation to so hold). Courts have instead, as this Court instructed, viewed such challenges as questions of fact, to be decided on a case by case basis in view of the circumstances and the evidence presented by the party challenging the clause.[6] *See, e.g., In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274, 285 (4th Cir. 2007) ("[I]f a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively

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[5] In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), the Court was confronted with an agreement which, like the agreement in the present case, was silent with regard to class arbitrations. The Court did not address whether a provision affirmatively banning class arbitration might be unenforceable.

[6] Such a challenge to the waiver provision, as distinguished from a challenge to the contract itself is for the court, rather than the arbitrator, to decide. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006). It is "a gateway dispute about whether the parties are bound by a given arbitration clause." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). *Accord, In re American Express Merchants' Litigation*, 554 F.3d 300, 311 (2d Cir. 2009); *Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868, 877 (11th Cir. 2005) (whether a class action waiver is unenforceable because it "would have the practical effect of providing Defendants immunity" is an issue concerning the making of the arbitration agreement and is therefore a decision for the federal court under the FAA, 9 U.S.C. § 4 (2000)).

expensive, such a showing could invalidate an agreement.").

Thus. some courts have upheld collective action waivers where, as in *Randolph*, the plaintiff did not provide sufficient evidence that, without class arbitration, the cost to plaintiff to obtain an individual arbitration would be prohibitive. *See In re Cotton Yarn Antitrust Litigation*, 505 F.3d at 285 ("[U]ninformed speculation about cost falls far short of satisfying the plaintiffs' burden of proving that the costs of proceeding individually against the defendants would be prohibitive and thus would prevent them from effectively vindicating their statutory rights."); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) ("the Livingstons have not offered any specific evidence of arbitration costs that they may face . . .").

Other courts have held that particular provisions were not unconscionable where the corporation agreed to bear much of the expense, removing cost as a barrier. *See, e.g., Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868 (11th Cir. 2005) (ban on class arbitrations was not a barrier to remedy where prevailing plaintiffs were entitled under state law to recover attorney fees and the company would advance filing fees and administrative fees); *Large v. Conseco Finance Servicing Corp.*, 292 F.3d 49 (1st Cir. 2002) (upholding class action waiver where the company volunteered to pay the costs of arbitration). A statement by this Court indicating blanket approval of collective action waivers would remove any incentive for contracting corporations to ameliorate the most significant barrier for individuals by easing the cost of arbitration.

Those courts that have declined to enforce arbitration provisions barring collective action have done so primarily on the basis of detailed inquiry into whether plaintiffs who are required to pursue claims one at a time have a practical and feasible remedy, or one that is merely illusory. A sampling of decisions in a variety of contexts illustrates the rigor of that inquiry, focusing on whether the costs facing plaintiffs in individual arbitrations outweigh the potential arbitral award and whether a significant number of aggrieved individuals have actually pursued individual remedy.

For example, the plaintiff in *Reuter v. Davis*, 2006 WL 3743016 (Fla. Cir. Ct. 2006), filed a class action against a check-cashing service alleging that the service illegally charged in excess of 45% annual interest. Plaintiff presented sufficient evidence for the court to find that the "chance that Ms. Reuter could have obtained competent counsel absent the possibility of class action status" was "effectively zero." That finding was supported by the facts showing that, although over 66,000 customers engaged in over 1,000,000 such transactions during a five year period and the alleged loan sharking was punishable as a third-degree felony under Florida law, not a single individual claim was filed. *Id.* at *4. The court concluded that the class action waiver was unenforceable as unconscionable because it effectively exculpated the defendant from statutory claims. *Id.* at *5.

In *Coneff v. AT & T Corp.*, 620 F.Supp.2d 1248 (W.D. Wash. 2009), customers of a wireless telecommunications service provider brought a putative class action alleging the company deliberately degraded lower-priced service in order to

sell more expensive plans. The provider relied on its contract provision requiring arbitration and stating that the "arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding." The court rejected the company's characterization of the arbitration provision as uniquely "pro-consumer," pointing out that of over 70 million customers, only 200 consumer arbitrations have been conducted nationwide since 2003. *Id.* at 1258. Moreover, plaintiffs submitted declarations of consumer lawyers from across the country, all of whom testified that it was impractical to pursue the small claims, ranging from about $5 to $275, on an individual basis. *Id.* at 1257. The court concluded that "given the prohibitively expensive costs of individual adjudication" defendants were using their arbitration provisions "to effectively exculpate themselves from any potential liability for unfair or deceptive acts or practices in commerce." *Id.* at 1259.

Similarly, in *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007), customers brought a class action alleging that their wireless service provider overcharged consumers between $1 and $45 per month in unlawful charges. Cingular's customer contract, as amended by a "stuffer" included with their monthly bill, precluded both class actions and class arbitrations. Plaintiffs presented expert testimony that the state attorney general's office relied on private class actions "to correct the deceptive or unfair industry practice and to reimburse consumers for their losses." *Id.* at 1004. Additionally, an attorney specializing in consumer law explained that the claims against Cingular were too small and complex to be adjudicated separately. He testified that he would be unwilling to take on

such cases and that it was "very unlikely that any other private practice attorney would be willing to do so." *Id.*

Small businesses are also at risk that contract provisions prohibiting collective action will preclude them from vindicating their statutory rights. Plaintiffs in *In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009), pet. for cert. filed, No. 08-1473 (May 29, 2009), are merchants and small businesses who alleged that in their contracts to accept defendant's highly desired charge cards, they were required to honor less desirable credit and debit cards at excessive fees, amounting to an illegal tying arrangement in violation of Section 1 of the Sherman Act. *Id.* at 307-08. The contract also provided for arbitration of claims and explicitly provided, "There shall be no right or authority for any Claims to be arbitrated on a class action basis." *Id.* at 306. Plaintiffs presented expert testimony that the cost of a necessary antitrust study, expert fees and litigation expenses in an individual case would total between $600,000 and $1 million. The average award a successful individual plaintiff could expect, even after trebling of damages, ranged from a little more than $9,000 to $38,549. *Id.* at 316-17. The court concluded that because plaintiffs' claims "cannot reasonably be pursued as individual actions," the ban on collective action "flatly ensures that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws" and is therefore unenforceable. *Id.* at 319.

In *Kristian v. Comcast*, 446 F.3d 25 (1st Cir. 2007), cable television subscribers brought an antitrust class action against their cable provider. Defendant moved to compel arbitration of claims on

an individual basis, relying on their contract provision precluding arbitrations on a class basis. The court of appeals summarized the declarations of plaintiffs' legal and economic experts: Each individual plaintiff's estimated recovery, trebled, "would range from a few hundred dollars to perhaps a few thousand dollars." *Id.* at 54. By contrast, "the expert fees alone are estimated to be in the hundreds of thousands of dollars; and attorney's fees could reach into the millions of dollars." *Id.* The practical effect, the court concluded, was to force claimants "to assume financial burdens so prohibitive as to deter the bringing of claims," *Id.* at 55.

These decisions by state and federal courts are faithful to this Court's instruction in *Randolph* that collective action waivers may be declared unenforceable where plaintiff has borne the burden of proving that such provisions stand as a barrier to the vindication of statutory rights. *See also* Jean R. Sternlight & Elizabeth J. Jensen, *Mandatory Arbitration: Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse*, 67 LAW & CONTEMP. PROBS. 75, 87 (2004) (noting that plaintiffs challenging such provisions have succeeded "when they can support their assertions factually, rather than ask courts to assume" that small claims cannot be brought individually).

II. DECISIONS AGAINST ENFORCEMENT OF COLLECTIVE ACTION WAIVERS AS PRECLUDING THE VINDICATION OF IMPORTANT RIGHTS ARE CONSISTENT WITH THE FAA AND WITH THE FEDERAL POLICY FAVORING ARBITRATION

Petitioner's *amici* contend that any state law "allowing class arbitrations to be superimposed on" arbitration agreements is inconsistent with, and subject to preemption by, the Federal Arbitration Act. *See, e.g.*, Chamber of Commerce Br. 18. Their position is at odds with the decisions of this Court and with the plain text of the FAA itself.

A. Collective Action Waivers Are Not Entitled To Enforcement Under the FAA.

Section 2 of the Act requires that "[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable . . ." 9 U.S.C. § 2 (1976). Collective action waivers that now appear in many consumer and employee contracts are not within the scope of § 2. They are in fact written provisions *prohibiting* the arbitration of certain claims.

This Court has at least indirectly indicated that class arbitrations are not at all inconsistent with individual arbitrations encouraged by the FAA. For example, the Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), noted with apparent approval the fact that the NYSE arbitration rules at issue in that case not only govern individual arbitrations, but "also provide for collective proceedings." *Id.* at 32.

In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), the Court granted certiorari on the question of whether South Carolina's interpretation of an arbitration agreement as permitting class arbitration was "consistent with the Federal Arbitration Act." *Id.* at 447. A plurality of this Court held that interpretation of the agreement was for the arbitrator, and made clear that a class arbitration would be permissible if the arbitrator so construed the contract on remand. *See id.* at 452-54. Justice Stevens, supplying the fifth vote in support of the judgment, explicitly stated "[t]here is nothing in the Federal Arbitration Act that precludes" class arbitrations. *Id.* at 454-55 (Stevens, J., concurring in the judgment).

Recently, Justice Scalia, writing for the majority in *Arthur Andersen LLP v. Carlisle*, ____ U.S. ____ , 129 S. Ct. 1896 (2009), indicated there no federal impediment to state law favoring arbitration on a class basis: "Whatever the meaning of this vague prescription [of "a healthy regard for the federal policy favoring arbitration"], it cannot possibly require the disregard of state law *permitting* arbitration by or against nonparties to the written arbitration agreement. *Id.* at 1902 n.5. (emphasis in original).

As one state supreme court summarized, "[W]e see no reason why the purposes of favoring individual arbitration would not equally favor class-wide arbitration." *Scott v. Cingular Wireless*, 161 P.3d 1000, 1008 (2007). After all, "[t]he FAA favors arbitration, not exculpation." *Id.*

B. Non-Enforcement of Collective Action Waivers Found to Prevent the Vindication of Statutory Rights Comports With the FAA.

1. Arbitration agreements may be held non-enforceable under laws generally applicable to contracts.

Even if provisions disallowing class arbitration were deemed to come within § 2, non-enforcement based on a judicial determination that the provision presents a practical barrier to the vindication of important statutory rights comports with the FAA.

Contrary to the assertions raised by Petitioner's *amici*, the FAA does not guarantee that the intent of the parties shall always be carried out. *See* CTIA-The Wireless Association Br. 5 the "preeminent concern" of Congress in the FAA is rigorous enforcement of contracts as written); Pacific Legal Foundation Br. 15 (The goal of the FAA is not efficiency, but "to enforce agreements into which the parties had entered.").

Section 2 provides that arbitration agreements shall be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1976) (emphasis supplied). As this Court has consistently emphasized, Congress enacted the FAA to put arbitration agreements "on equal footing with all other contracts." *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, ___, 128 S. Ct. 1396, 1402 (2008), quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Congress designed Section 2 "to make arbitration agreements as enforceable as other contracts, but not

more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n.12 (1967).

Consequently, state law "is applicable to determine which contracts are binding under § 2 and enforceable under § 3 '*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.'" *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. at 1902, quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987) (emphasis in original). In particular, "generally applicable contract defenses, such as fraud, duress, or *unconscionability*, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996) (emphasis added). Decisions invalidating collective action waivers as unconscionable under state law are therefore wholly consistent with the FAA because they are not based on "state laws applicable *only* to arbitration provisions." *Id.* at 687 (emphasis in original).

2. Courts have properly held collective action waivers unconscionable and non-enforceable as violative of public policy under state contract law.

The decisions holding collective action waivers unenforceable under state law have been based primarily on generally applicable unconscionability principles. As this Court suggested in *Doctor's Associates, supra*, that contract defense is a state law of general applicability and is not limited to arbitration provisions.

The unconscionability doctrine originated in England and was expressly recognized by United

States equity courts as early as 1795. Howard O. Hunter, MODERN LAW OF CONTRACTS § 19:06 (rev. ed. 1993). *See also* Francis J. Swayze, *The Growing Law*, 25 YALE L.J. 1, 1 (1915) (observing that courts have historically "refused their aid to the unconscionable bargain.").

RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) states the general rule: "If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract," and adds by way of comment that "the policy against unconscionable contracts or terms applies to a wide variety of types of conduct." *Id.* at comment a. Similarly, the Uniform Commercial Code permits a court to refuse to enforce a contract or a clause thereof which was "unconscionable at the time it was made." U.C.C § 2-302.

A closely related doctrine is the historic principle that a contract term "is unenforceable on grounds of public policy if . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement." RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981). That principle, too, is broader and older than the FAA. *See, e.g.*, *Hulse v. Bonsack Mach. Co.*, 65 F. 864, 867-69 (4th Cir. 1895) (discussing whether a mechanic's contract assigning to the employer the rights to any improvements to the company's machines was unenforceable as contrary to the public policy encouraging creativity and invention).

The term "unconscionability" is not specifically defined in state law, but "is rooted in the fact-sensitive public interest assessment." *Muhammed*, 912 A.2d at 102. Upon proof that plaintiff's statutory

claims are so small that the ban on class arbitration effectively precludes a plaintiff from vindicating her statutory rights, a number of courts have concluded that such provisions are unconscionable. As the Washington Supreme Court was careful to note, its holding did not invalidate all class-action waivers. *Scott*, 161 P.3d at 1009 n.7. "We mean to say only that class action waivers that prevent vindication of rights . . . are invalid . . . . [W]hether any particular class action waiver is unenforceable will turn on the facts of the particular case. *Id.* Similarly, the Third Circuit emphasized that its decision against enforcement of a class action waiver as unconscionable was based on "the fundamental public policy of New Jersey" that consumers be able to pursue their statutory rights under the state's consumer protection laws." *Homa*, 558 F.3d at 230-31.

The Eleventh Circuit, applying Georgia law, has also held that contract provisions blocking individuals from asserting their statutory rights can be unconscionable. In *Dale v. Comcast*, 498 F.3d 1216 (11th Cir. 2007), the court determined that enforceability of a class action waiver should be determined on a case by case basis, after considering all the facts and circumstances including the fairness of the provision, the cost to the individual plaintiff of prosecuting its claim when compared to the potential recovery, the ability to recover attorney's fees and other costs and thus obtain legal representation to prosecute the underlying claim, and the practical effect that the waiver will have on the corporation's ability "to engage in unchecked market behavior that may be unlawful." *Id.* at 1224. *See, also, Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1219 (9th Cir. 2008) (holding class action waiver contained in

cellular telephone contract unconscionable under Washington law); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 984 (9th Cir. 2007) (holding class action waiver in cellular phone contract unconscionable under California law).

The Chamber of Commerce acknowledges that courts may decline to enforce arbitration provisions based on generally applicable state law of contracts. Chamber of Commerce Br. 18. The Chamber contends, however, that judges apply the doctrine of unconscionability "more aggressively to arbitration agreements than to other contracts." *Id.* at 19 n.6, quoting Steven J. Ware, *Arbitration and Unconscionability After Doctor's Associates Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1034 (1996), and citing two other articles for the same proposition. None of these authorities support the Chamber's argument.

Professor Ware's article deals exclusively with unconscionability as applied to contracts of adhesion and unequal bargaining power. Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004), points to no decision announcing a more aggressive standard for arbitration cases, but simply but contends that judges find arbitration agreements unconscionable more often now than 20 years ago. *Id.* at 194-96. The third article, Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61, focuses entirely on California law and mentions arbitration waivers only once in passing. Id. at 88. Together, these weak speculations

provide a woefully inadequate basis for this Court to undertake to second-guess state courts on matters of state law.

3. Non-enforcement of collective action waivers that block the vindication of statutory rights is consistent with federal principles of arbitrability.

The growing body of decisions based on state law unconscionability is not only consistent with § 2 of the Federal Arbitration Act's restriction on state law, but also with the federal law of arbitrability developed by this Court.

The fact that a party's cause of action arising under a federal statute serves to advance important social policies does not preclude enforcing an agreement to submit the party's claim to arbitration. "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum," this Court has explained, "the statute will continue to serve both its remedial and deterrent function," *Green Tree Financial Corp v. Randolph*, 531 U.S. 79, 90 (2000), quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

Thus, although the FAA is silent on challenges to the effectiveness of the arbitral forum, this Court has stated that "the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum" and "render [the agreement] unenforceable." *Id.* 531 U.S. at 90-91.

This public policy contract defense is not limited to arbitration agreements. In this case, for example, the putative class seeks to pursue remedies under federal antitrust laws. *See* Pet. Br. 6-7. This Court has made clear that "in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action," an agreement which confers even "a partial immunity from civil liability for future violations" is inconsistent with the public interest. *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955). Applying this principle in the context of enforcing an arbitration agreement, this Court stated that, if the agreement's choice-of-forum and choice-of-law clauses "operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy. *Mitsubishi*, 473 U.S. at 637 n.19.

On this basis, the Second Circuit recently held that a waiver provision in a contract between a credit card company and accepting merchants "cannot be enforced in this case because to do so would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery." *In re American Express Merchants' Litigation*, 554 F.3d 300, 320 (2d Cir. 2009). The court expressly stated that its ruling was not based on state law of unconscionability, but "on a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability." *Id.*

III. CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

October 27, 2009 Respectfully submitted,

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AMICUS CURIAE BRIEF

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STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF ASSOCIATION OF SHIP BROKERS AND AGENTS, BIMCO, BERGEN SHIPOWNERS ASSOCIATION, CHAMBER OF SHIPPING OF AMERICA, INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS, JAPAN SHIPPING EXCHANGE, INC., NORWEGIAN SHIPOWNERS ASSOCIATION, SOCIETY OF MARITIME ARBITRATORS, INC., TEEKAY CORPORATION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Association of Ship Brokers & Agents

The Association of Ship Brokers & Agents (U.S.A.), ("A.S.B.A.") is a membership trade organization founded in 1934. Its members consist of the leading shipbrokers and agents in the United States and Canada. A.S.B.A. promotes the interests of its members in particular, and the ocean shipping industry in general, in various ways. It has set high professional, ethical and fiduciary standards for its members through its Agency Certification program. It conducts educational seminars, home study and on-line courses about the shipping business and publishes a newsletter.

Of particular relevance, A.S.B.A. maintains and causes to be published various standard form charter parties in common usage in the shipping business. One of these forms is a tanker voyage charter used throughout the tanker shipping industry, which includes the parcel trades, and is known by its code name ASBATANKVOY.

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[1] No counsel for any party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of the brief, and no person other than the *amici curiae* represented in this brief or their counsel made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court.

The Baltic and International Maritime Council

The Baltic and International Maritime Council ("BIMCO"), founded in 1905, is the world's oldest and one of the largest associations of shipowners, ship managers, shipbrokers, agents, operators, associations, and other entities connected with the international shipping industry. BIMCO's membership includes almost 1,000 shipowners, 1,400 ship brokers, and other shipping related companies. Shipowner members represent more than 65% of the world's available cargo carrying-capacity.

BIMCO strives to raise the standards of its members through the harmonization of commercial shipping practices. It promotes quality, safety, security, environmental protection, the fair treatment of seafarers, free trade, and open access to markets. To accomplish these goals, when appropriate and circumstances so demand, BIMCO takes a position on important issues facing the shipping industry, including filing briefs *amicus curiae* with this Court.

BIMCO is also the acknowledged leader in the production of standard documents and clauses for the maritime industry. BIMCO has, for instance, developed a standard dispute resolution clause which is widely used in the industry. Use of standard documents reduces the need to negotiate each contract, promotes uniformity, and raises standards. These balanced documents are trusted by all parties in the maritime industry.

Bergen Shipowners Association

The Bergen Shipowners Association ("BSA") is the oldest shipowners association in Norway, founded in 1889. Bergen is one of the largest and most active maritime cities in the world. In 2006, 525 vessels were recorded carrying 5.3 million gross dead weight tons via the Bergen port. The BSA has over 240 members, including approximately 40 shipping related companies and organizations. The BSA supports Norway's domestic maritime industry and promotes global maritime trade. It facilitates discussions and negotiations between members of Norway's shipping industry and works to develop solutions to the challenges facing the international maritime industry.

Chamber of Shipping of America

The Chamber of Shipping of America's ("CSA") membership includes 35 U.S.-based companies that either own, operate, or charter oceangoing container ships, dry bulk vessels, and tankers engaged in both the domestic and international trades, and companies that maintain a commercial interest in the operation of such oceangoing vessels.

CSA provides the voice of the U.S. maritime industry in promoting sound public policy through legislative and regulatory initiatives that include marine safety, maritime security, and environmentally protective operating principles. CSA supports a viable domestic maritime industry and promotes open

international trade in shipping services. CSA also provides strong technical expertise, marine experience, and knowledge in order to be an authoritative and effective forum for U.S. maritime issues.

CSA represents owners, operators, and charterers of both U.S. and foreign flag ocean vessels before U.S. regulatory, legislative, and administrative entities.

International Association of Independent Tanker Owners

The International Association of Independent Tanker Owners ("INTERTANKO") is an unincorporated, not-for-profit association of independent tanker owners and operators. As used in this context, "independent" reflects INTERTANKO membership criteria that member companies be tanker owners neither owned nor controlled by cargo owners (*e.g.*, oil companies) whose cargo is carried aboard INTERTANKO vessels. INTERTANKO, however, works closely with all sectors of the international marine tanker market, and oil company-owned tanker companies participate in INTERTANKO activities as associate members.

INTERTANKO has a membership of 270 independent tanker owners and over 330 associate members. INTERTANKO's full members own, operate and manage more than 3,100 tankers in all major maritime trades of the world, including all major liquid bulk ports in the United States. These

members operate tankers totaling approximately 250 million tons (deadweight), or 80% of the world's independent tanker fleet. INTERTANKO has non-governmental organization status at the International Maritime Organization ("IMO") and consultative status at the UN Conference on Trade and Development.

Japan Shipping Exchange, Inc.

The Japan Shipping Exchange, Inc. ("JSE"), founded in 1921, is a non-profit and non-governmental organization which facilitates world maritime-related business transactions and assists maritime companies and organizations. Its members include more than 390 companies and organizations, including shipping companies, traders, steel-mills, shipbuilders, marine underwriters, protection and indemnity ("P&I") clubs, shipbrokers, agents, warehousing companies, banks, and law firms.

JSE serves the shipping industry by administering maritime arbitrations, drafting and promulgating maritime contract forms, publishing in-depth analysis on shipping and logistics in the form of the monthly magazine "KAIUN" and other periodicals including "Maritime Law Review" and "Mariners Digest" and providing electronic shipping databases. JSE also responds to inquiries, consults and advises its members on the interpretation of shipping contract clauses, the maritime economy and Japanese shipping policies. JSE drafts and promulgates standard contract

forms such as Nanyozai Charter Party ("NANYOZAI 1967"), Iron Ore Charter Party ("NIPPONORE"), Voyage Charter Party ("NIPPONVOY"), and the Coal Charter Party ("NIPPONCOAL") and Nippon Grain Charter Party ("NIPPONGRAIN").

Norwegian Shipowners' Association

The Norwegian Shipowners' Association ("NSA") founded in 1909 is a trade organization representing Norwegian companies engaged in shipping and offshore industries. Norway is one of the five largest shipping nations in the world with its fleet representing approximately 5% of the world's total merchant fleet. Norwegian member companies own and/or operate approximately 1,400 vessels representing 48 million deadweight tons with 50% of these vessels flying the Norwegian flag. More than 90% of the Norwegian fleet is engaged in trading outside of Norwegian waters.

In some areas Norway's relative position in the shipping industry is even larger than what gross average figures indicate. For example, Norwegian companies control approximately 20% of the world's gas carriers (LPG) and 20% of the world's chemical tankers. The vast majority of this trading is carried out via charter parties.

Society of Maritime Arbitrators, Inc.

In order to promote sound and ethical standards for maritime arbitrations, a group of individuals,

active as arbitrators, created the Society of Maritime Arbitrators, Inc. ("SMA") in 1963. Today the majority of shipping-related arbitrations in the United States are decided by members of the SMA under the auspices of the SMA Rules. The SMA is a non-profit, professional organization with a membership of approximately 75 experienced shipping professionals from all walks of the industry. The SMA maintains and publishes the SMA Arbitration Rules, the SMA Rules for Shortened Arbitration Procedure, the SMA Rules for Conciliation, Rules for Mediation, Rules for Recreational and Small Commercial Vessel Salvage Arbitration, and the SMA Code of Ethics.

The SMA also publishes "The Arbitrator," a newsletter with more than 1,500 readers worldwide. Perhaps one of the most significant functions of the SMA is to organize workshops and seminars throughout the year in addition to hosting a monthly, open luncheon for members and shipping professionals featuring presentations on relevant topics. As the leading organization in the United States dealing exclusively with maritime arbitration, the SMA is concerned that arbitration proceedings are conducted in accordance with rules and practices that are understood and recognized in the industry and that are not unduly ambiguous, unclear, or inconsistently applied.

Teekay Corporation

Teekay Corporation ("Teekay") operates more than 175 vessels, including time-chartered and commercially managed vessels, and is an essential

marine link in the global energy supply chain. Teekay's vessels connect upstream gas and oil production with downstream refining and distribution. In 2006, Teekay's tanker fleet transported 236.8 million metric tons of oil and 3.9 million metric tons of liquefied natural gas ("LNG") – representing approximately 10 percent of the world's seaborne oil movements and about 2.4 percent of the world's LNG transport. In 2006, the Teekay fleet completed 3,307 voyages. Teekay has offices in 16 countries around the world and provides a comprehensive set of marine services to the world's leading oil and gas companies.

INTRODUCTION

Global trade relies almost entirely on the shipping industry for its transportation needs. Fully ninety percent of international trade moves by ships and other forms of marine transport. Shipping Facts, Shipping and World Trade, http://www.marisec.org/shippingfacts/worldtrade/index.php.

Meeting this staggering requirement are fifty thousand merchant ships registered in over one hundred and fifty nations. *Id.* It is difficult to think of an industry more international in scope than the shipping industry.

A key part of the international shipping industry is the parcel tanker trade. A parcel tanker is a vessel designed to carry simultaneously an assortment of bulk chemicals, vegetable oils and other liquids.

Utilizing sophisticated pumps and dedicated lines, bulk liquid cargoes (or "parcels") can be loaded, carried and discharged without contamination or loss.

Shippers in this trade normally engage the services of parcel tankers by entering into bilateral ship charters incorporating charter forms known in the industry by source (*e.g.*, ASBATANKVOY) or by trade (*e.g.*, VEGOILVOY). Sometimes, the parcel tanker charter can be for the entire vessel but, much more often, the charter covers only a "part cargo." It is normal for a loaded parcel tanker to have a large number of different cargoes owned by many different shippers, several of which compete with one another. As the information regarding customers, pricing, commodities, quantities and trade routes is extremely sensitive, the shipowner and its charterer normally agree to keep the chartering details private and confidential ("p and c" in shipping parlance).

SUMMARY OF ARGUMENT

Charter party forms, such as ASBATANKVOY and VEGOILVOY, are universally employed to provide known, understood and accepted contractual frameworks for the chartering of vessels. A dispute arising out of a charter party traditionally is resolved in arbitration by a panel of experienced maritime arbitrators applying maritime law. Maritime arbitrations are bilateral, private proceedings in which the parties expect to receive a quick commercial

decision. Class actions, which are not private, not informal and not quickly resolved, are alien to the customs and practices of maritime arbitral practice. It is, therefore, unreasonable to interpret silence in an arbitration provision as meaning that the parties intended to consent to class arbitration. To impose class arbitrations based on such silent provisions would be unprecedented and would compel the parties to go beyond that which they consented to arbitrate, thereby leading to unwelcome surprise and deep dissatisfaction. Furthermore, imputing consent to class arbitration, in the absence of express consensual language, would deter maritime contract parties from agreeing to arbitration in the United States.

ARGUMENT

I. Charter Party Dispute Resolution Historically Has Relied on Bilateral Arbitration Accomplished Quickly and Privately Before Arbitrators of the Parties' Choosing

A "charter party" (sometimes shortened to "charter") is a contractual arrangement, usually in writing, by which the shipowner or vessel operator contracts with another, termed the "charterer," to use the vessel. Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 4-1, at 193 (2d ed. 1975). The first known usage of the term "charter party" dates back to 1539. Stewart C. Boyd et al., *Scrutton on*

Charterparties and Bills of Lading 3 n.19 (20th ed. 1996). Professor Schoenbaum in his treatise, *Admiralty and Maritime Law*, describes the origin of this term:

> The term "charter party" derives from the Latin, *charta partita* (a divided document), which shows the ancient origin of this arrangement. In the middle ages a contract technique was as follows: An agreement was written out twice on the same piece of parchment, then cut in half on a jagged line. . . . Each party would retain a half, and comparing the two halves would prove the agreement's authenticity.

Thomas J. Schoenbaum, 2 *Admiralty and Maritime Law* § 11-1, at 2 n.1 (4th ed. 2004).

There are different kinds of charter parties. The principal delineating factor is whether the charter party amounts to a lease of the vessel. Boyd et al., *supra*, at 59. If the shipowner has "parted with the whole possession and control of the ship," the charter is considered a lease of the vessel and is referred to in the trade as a "demise" or "bareboat" charter. *Id.* (quoting *Baumwoll v. Gilchrest*, [1892] 1 Q.B. 253, 259). As to charter parties that do not amount to demise charters, there are principally two kinds of charter parties. One is a contract under which the shipowner agrees with the charterer to carry one or more cargoes from one port to another on a single voyage (a "voyage charter"). *Id.* at 63-64. The other is a contract under which a shipowner agrees to carry

cargoes for a stated period of time normally covering more than one voyage (a "time charter"). *Id.* at 63. Regardless of the kind of charter party, all are considered maritime contracts. Gilmore & Black, *supra*, at 193; 1 *Benedict on Admiralty* § 183, at 12-7 (Steven F. Friedell ed., 7th ed. 2008); *Armour & Co. v. Fort Morgan S.S. Co.*, 270 U.S. 253, 259 (1926); *Morewood v. Enequist*, 64 U.S. 491, 493-94 (1859).

A. Arbitration Practices in Charter Parties

Almost all charters contain dispute resolution provisions providing for arbitration. Schoenbaum, *supra*, § 11-19, at 47 ("[a]ll forms of charter parties routinely provide for dispute settlement by arbitration"). One commentator describes the traditional use of arbitration in charter party disputes thus:

> Among long established and time honored uses of arbitration in the various spheres of activity in trade and commerce, few can compare with charter parties. These have, from early time, provided for recourse to arbitration as a preferred method for the resolution and settlement of disputes.

Richard A. Lord, 21 *Williston on Contracts* § 57:147, at 686-87 (4th ed. 2001). Professor Lord explains why arbitration provisions have long been so prevalent:

> The international nature of the maritime business makes arbitration more practicable

> – and its awards more portable – than litigation, which is subject to the vagaries of diverse courts, imposing differing legal standards dependent more on national history than on the realities of seafaring commerce.

Id. at 687.

The United States Congress expressly endorsed the arbitration of maritime disputes when it enacted the Federal Arbitration Act in 1925 (9 U.S.C. §§ 1-16 (2006)) ("FAA"). Section 2 states that an arbitration provision "in any maritime transaction" is considered "valid, irrevocable, and enforceable." *Id.* § 2. Similarly, in the legislation implementing the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (9 U.S.C. §§ 201-208 (2006) (the "New York Convention"),[2] the U.S. Congress stated that any transaction included in "section 2 of this title [*i.e.*, 'any maritime transaction'] falls under the Convention." *Id.* § 202. *See also Atlas Chartering Servs. Inc. v. World Trade Group, Inc.*, 453 F. Supp. 861, 863 (S.D.N.Y. 1978).

The pervasive use of arbitration in the maritime industry is due to its several advantageous practices. One such practice is the bilateral nature of arbitration. The Chairman of the Arbitration Committee of the Chamber of Commerce of the State of New

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[2] June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, *reprinted in* 6A *Benedict on Admiralty* Doc. 7-1 (Frank L. Wiswall, Jr. ed., 7th ed. rev. 2007).

York, Charles Bernheimer, was a prominent witness in the hearings that preceded the enactment of the FAA. Mr. Bernheimer testified as to the efficacy of the "face to face" nature of bilateral arbitration:

> When the two parties to a dispute . . . are face to face they see, in the presence of a third man, their respective viewpoints better than they did before. . . . They are on speaking terms again and on terms of willingness to listen to reason, which they were not before, when they were separated and did not see each other face to face.

David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 60 (2007) (quoting *Hearing On S.4213 and S.4214 Before the Subcomm. of the S. Comm on the Judiciary*, 67th Cong. 5 1923) (statement of Charles L. Bernheimer).

Another important practice is that an arbitration proceeding, unless agreed otherwise, is private. Mr. Bruce Harris, an experienced maritime arbitrator, in his declaration which was submitted in evidence in this matter, emphasized the attraction of resolving maritime disputes in a private proceeding:

> Parties also choose to arbitrate their maritime disputes because arbitration is a private and confidential process. Arbitration allows the parties to a specific dispute to have that dispute considered and resolved behind closed doors, entirely between

> themselves, without the risk of the terms of their commercial relationship being disclosed to third parties.

Expert Declaration of Bruce Harris, dated Oct. 18, 2005, JA 128a, at JA 131a, ¶8 [hereinafter Harris Decl.].

One other highly valued practice is that the parties can select those who will decide the dispute. Most charter arbitration provisions provide that three arbitrators are to decide the disputes with each side appointing one arbitrator and the two arbitrators selecting the third arbitrator who acts as Chair.[3] Society of Maritime Arbitrators, Inc., *Maritime Arbitration in New York* 4 (4th ed. 2003) [hereinafter *SMA Guidebook*]. Traditionally, the parties choose commercial persons (*i.e.*, non-lawyers) with maritime experience to serve as arbitrators.[4] *Id.* at 7. Each party then would select someone who has the requisite commercial knowledge and experience to decide the dispute. John Kimball, a noted and experienced New York maritime lawyer who submitted a declaration in this matter, stated:

> In my experience, the parties I represent regard these appointment rights as an

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[3] In some arbitration provisions, the two party arbitrators do not choose a third arbitrator until the arbitration has been completed and then only if the two arbitrators cannot agree as to the result. *See, e.g.*, VEGOILVOY form, JA 9a, at JA 30a.

[4] In some arbitration provisions, having arbitrators with maritime industry experience is thought to be so important, it is mandated. *See, e.g., id.*

> indispensable feature of their arbitration agreements and exercise them with the utmost care and seriousness.

Expert Declaration of John Kimball, dated Oct. 18, 2005, JA 119a, at JA 122a, ¶10 [hereinafter Kimball Decl.].

Mr. Harris agreed as to the importance of the parties selecting the arbitrators:

> The parties also guarantee that they will have a voice in the selection of their decision makers (usually each is entitled to appoint an arbitrator of its choosing), and therefore that those decision-makers will have what the parties judge to be the requisite experience and qualifications to decide the dispute.

Harris Decl., at JA 130a, ¶6.

In its Guidebook, the Society of Maritime Arbitrators ("SMA") describes the advantages to the parties of selecting the arbitrators: "[they] normally are comprised of one's peers in the industry – commercial people who apply their knowledge and understanding in what are often specialized areas." *SMA Guidebook* at 7. Courts also acknowledge the importance of peer review. For example, the Seventh Circuit recently stated:

> [T]hey have bargained for *the arbitrator's* interpretation of their contract – not ours. "Putting . . . matters in the hands of specialists rather than judges or jurors is one

> attraction of arbitration." If we were to weigh in on the merits of their case, we would be denying them the benefit of that bargain.

United Steel, Paper & Forestry, Rubber Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Trimas Corp., 531 F.3d 531, 536 (7th Cir. 2008) (citation omitted).

Still another practice is the expectation that the proceeding will conclude and an award will be rendered more quickly than in a court proceeding. As stated by Mr. Kimball:

> Arbitration also offers greater procedural flexibility than litigation, and is intended to result in a faster and less expensive proceeding. These features are particularly important to parties in maritime disputes, where exigent circumstances often require a quick resolution of a dispute. . . .

Kimball Decl., at JA 122a, ¶11.

> In its Guidebook, the SMA states:
>
> Justice in New York arbitration is swift and final. Such speed and finality can effectively reduce costs, particularly when compared to court proceedings. . . .

SMA Guidebook at 9.

Those practices (a bilateral proceeding accomplished quickly and privately before an experienced and knowledgeable panel of arbitrators of the parties' choosing) are the advantages that parties

seek in arbitrating charter party disputes. Those advantageous practices are an important, accepted and acknowledged part of the maritime industry. Senior Judge Haight expressed his understanding of the role of maritime practices thus:

> In determining whether the parties' minds met with respect to an arbitration clause, a court applies the ordinary principles of contract construction. However, where as here the contract is one of charter party, established practices and customs of the shipping industry inform the court's analysis of what the parties agreed to.

Samsun Corp. v. Khozestan Mach. Kar Co., 926 F. Supp. 436, 439 (S.D.N.Y. 1996) (citation omitted); *see also Orvig's Dampskibselskab A/S v. Munson Line S.S. Line*, 16 F.2d 957, 958 (2d Cir. 1927); *Schoonmaker-Conners Co. v. Lambert Transp. Co.*, 269 F. 583, 585 (2d Cir. 1920).

The maritime practices described above should guide the Court in deciding that a silent charter party arbitration provision cannot support a class action.

B. The Arbitration Provisions in the VEGOILVOY and ASBATANKVOY Confirm that the Parties Intended to Enjoy the Advantages of Maritime Arbitration

In negotiating a charter party, the parties attempt to agree to several variable terms including

the freight rate or hire amount, the quantity of and cargo type to be carried, the load and discharge ports (in the case of a voyage charter) or the duration of the charter (in the case of a time charter). Schoenbaum, *supra,* § 11-2, at 5. Another variable is the printed charter form which contains necessary terms which complement the variable terms and which experienced parties know and understand. Often, if the form is for a voyage charter, the suffix "voy" is added in naming the form or, if the form is for a time charter, the suffix "time" is added.

Charter party forms are drafted and issued by a number of maritime associations and companies. Some like *amici* BIMCO and INTERTANKO seek to produce forms and clauses that are designed to obtain broad industry acceptance. BIMCO, *Forms of Approved Documents* 2-3 (Rev'd Apr. 2009). Others, like major oil companies or commodity traders, issue forms or sets of clauses designed to fulfill their own requirements (usually as vessel charterers) and to take advantage of their superior bargaining power. Lars Gordon et al., *Shipbroking and Chartering Practices* 108 (6th ed. 2004). Included in these forms are a wide range of subjects that need to be covered if the contractual relationship is to proceed smoothly. Some of the common subjects concern arrival, delay, cleanliness, cancellation, liens and, of course, arbitration. These forms and the terms within, over time and through usage, become well-known in the maritime community. Kimball Decl., at JA 124a, ¶15. Also, as the charter terms are construed by the trade

and, sometimes, by arbitrators, those constructions assume the force of law. Robert Force, *Choice of Law in Admiralty Cases: "National Interests" and the Admiralty Clause*, 75 Tul. L. Rev. 1421, 1481 (2001). The use of the charter forms speeds negotiations and minimizes disputes. If disputes do arise, the arbitration provisions allow for the resolution of the disputes privately and speedily. While using a form is not necessary, it is almost always part of an international charter party. *See* Schoenbaum, *supra*, § 11-2, at 4-5.

The ASBATANKVOY form (JA 32a) was first published in 1977 by the Association of Ship Brokers and Agents (U.S.A.) Inc. ("A.S.B.A.").[5] Julian Cooke et al., *Voyage Charters* 757 (3d ed. 2007). Its creator was Exxon Inc. (now ExxonMobil Inc.) and its original name was EXXONVOY. *Id.* When Exxon abandoned the EXXONVOY form to prepare a new iteration, it permitted A.S.B.A. to issue it under the ASBATANKVOY name. *Id.* In developing the EXXONVOY form, Exxon based it on the WARSHIPOILVOY form which had been issued by the U.S. government during World War II. D. Thomas McCune, *The ASBATANKVOY Charter* 1 (Lloyd's of London Press 1984).

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[5] As noted by Petitioners, the ASBATANKVOY charter form was used by some claimants which are no longer in the case. Petr.'s Br. 4 n.3. If this case proceeds with a class being established, some claimants, having used the ASBATANKVOY form, would be expected to be included.

The VEGOILVOY form was created in 1950 (JA 9a) and is very similar to both the EXXONVOY and ASBATANKVOY forms. That similarity results from their common sources. The VEGOILVOY form also was based on the WARSHIPOILVOY form.[6] *See* Charles L. Trowbridge, *The History, Development, and Characteristics of the Charter Concept,* 49 Tul. L. Rev. 743, 759 (1975). Both the VEGOILVOY and the ASBATANKVOY forms are used in a number of trades. In the parcel tanker trade they are used for the carriage of chemicals, vegetable oils and other liquid cargoes. Both forms contain arbitration provisions.

VEGOILVOY's arbitration provision, Clause 31, states in relevant part:

> 31. Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and

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[6] WARSHIPOILVOY was the progenitor of a number of charter party forms including INTERTANKVOY, VEGOILVOY and EXXONVOY.

> procedure of the United States Arbitration Act,. . . .

VEGOILVOY form, JA 9a, at JA 30a.

ASBATANKVOY's arbitration provision, Clause 24, uses different words but it has the same import. In relevant part, it states:

> 24. Arbitration. Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York or in the City of London whichever place is specified in Part I of this Charter pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen.

ASBATANKVOY form, JA 32a, at JA 50a-51a.

It is common ground that the parties did not amend Clause 31 of VEGOILVOY or Clause 24 of ASBATANKVOY expressly to allow class actions and that Clause 31 and Clause 24 are silent on the subject. Indeed, the text of each arbitration clause gives no indication that the parties intended to subject themselves to class arbitration. Clause 31 of the VEGOILVOY form requires the Owner and Charterer to arbitrate. JA at 30a. The terms, "Owner" and "Charterer" are identified and defined. *Id.* at 9a. They are the only parties to the charter party. Clause 31 is clear as to what disputes can be heard: only those "arising from the making, performance or

termination of this Charter Party." *Id.* at 30a. Clause 24 of the ASBATANKVOY form follows the same pattern.[7] Three justices of this Court found the similar results of a parsing of the arbitration provision dispositive in prohibiting class arbitrations in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 459 (2003) (Rehnquist, C.J., dissenting). The plurality found the analysis less "clear" as to whether the language prohibited class arbitration, but did not hold that the language indicated that the parties intended to subject themselves to class arbitration. *Id.* at 451. What can be agreed is that, while Clause 31 is silent on the subject of class actions, there is nothing in Clause 31 (or in the rest of the VEGOILVOY form) that would lead one to believe that, at the time of the making of the charter party, the parties intended, expected or desired that a class action could be imposed upon them. The issue then is whether, notwithstanding such silence, a class arbitration can be imposed.

II. Class Actions Are Alien To Maritime Arbitration

The nature of class actions and the lack of their acceptance internationally or within the maritime community strongly militate against the imputation

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[7] The "Owner" and "Charterer" are defined; only disputes " . . . arising out of this Charter . . . " are to be heard. JA 32a, 50a-51a.

of an intent by the parties to include such actions in a maritime arbitration.

A. Class Actions Are Designed for Negative Value Cases Involving Consumers, Not Disputes Between Industrial Companies

The notion that the parties here intended to subject themselves to class arbitration by signing the general bilateral arbitration provision at issue, which makes no mention of class arbitration, is particularly unfounded given that this dispute lies far afield from the purpose of the class action device:

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

The type of controversy that corresponds to this core policy of the class action mechanism is a negative value case, that is, "one in which the stakes to each member are too slight to repay the cost of the suit." William B. Rubenstein et al., 2 *Newberg on*

Class Actions § 4:33 (4th ed. 2009). Courts have recognized that the existence of a negative value suit is the most compelling reason to find a class action superior to other types of litigation, a finding required for a party to obtain class certification under Federal Rule of Civil Procedure 23(b)(3). *See, e.g.*, *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228, 1240 n.21 (11th Cir. 2000); *Castano v. Amer. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996).[8] Not surprisingly, then, the cases on which the Respondent relied before the arbitral panel, as examples of arbitrators interpreting silent arbitration clauses to permit class actions, were generally "consumer type . . . negative value cases." Tr. of Clause Construction Hearing, JA 77a, at 81a (statement by Arbitrator Jentes during argument); *see also* App. Pet. Cert. 50a (arbitral panel's noting Petitioner's argument to this effect and acknowledging that "none of the other [arbitral decisions allowing class arbitration] is exactly comparable"). In contrast to such consumer protection, negative value cases, Respondent admitted to the arbitrators that it would proceed individually with its claim for damages if a class is not certified. *See* Petr.'s Br. 14.

More generally, maritime arbitration – which is normally between two companies, not an individual consumer and a company – is well suited to resolve

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[8] In addition to satisfying the prerequisites of Rule 23(a), parties seeking class certification must satisfy either Rule 23(b)(1), (2), or (3). *See Amchem Products, Inc.*, 521 U.S. at 614.

disputes concerning small amounts of money. The SMA has a special set of procedures that permit efficient, low-cost arbitration of such disputes. *See* Society of Maritime Arbitrators, Inc., *Rules for Shortened Arbitration Procedure* (effective May 1, 2007), *available at* http://www.smany.org/sma/about6-2.html. Therefore, some disputes that would be negative value cases if brought in state or federal court would not be negative value cases in maritime arbitration.

In summary, this case is not a negative value dispute, and, indeed, disputes resolved through maritime arbitration are less likely to be negative value cases than those litigated in state or federal court. There is no basis in either the record or in logic to assume that the parties, by signing a bilateral arbitration agreement making no mention of class arbitration, consented to subject themselves to class arbitration of a dispute that is far removed from the type of controversy underlying the class action mechanism.

B. Class Actions Are Not Internationally Accepted

A defining feature of maritime commerce is that the parties are normally from different countries and their contracts normally involve international commerce. As an example, in the last one hundred arbitration awards published by the SMA, sixty-eight arbitrations involved at least one party domiciled

outside the United States.[9] For this reason, many maritime charters, including the ASBATANKVOY and VEGOILVOY forms, provide for a neutral system of dispute resolution that is not based on the unique laws or customs of any one nation.

This transnational character of the ASBATANKVOY and VEGOILVOY charters is compelling evidence that parties do not intend to subject themselves to class arbitration by agreeing to the silent arbitration clauses in those charters. Most nations do not permit litigation or arbitration comparable to American-style class actions. One scholar, writing in 2002, went so far as to conclude: "The class action is a uniquely American procedural device." Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions,* 52 DePaul L. Rev. 401, 401 (2002). Professor Sherman further explained:

> Many countries have procedures that permit, in certain circumstances, standing to sue in the place of others, aggregation of similar claims, or suits filed in some kind of representative capacity. However, such procedures fall short of the broad sweep of the contemporary American class action with its

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[9] Society of Maritime Arbitrators, Inc., *SMA Award Service*, Award Nos. 3943-039 dated October 11, 2006 – July 9, 2009 (there is an award number 3947A, and there are three awards designated "4001"), *available at* http://www.westlaw.com or http://www.lexis.com.

> incentives to litigate on behalf of a class. "Representative proceedings" have been available under English court rules for over two hundred years, but have been used infrequently as a result of early narrow interpretation by the courts and limitations on group-wide determination of damages.

Id. at 402 (footnote omitted).

And although group actions have gained some traction in other common law countries, they "are still relatively rare and unknown in civil law countries." Bernard Hanatiou, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* 257-58 (2005); *see also* Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 Nw. J. Int'l L. Bus. 301, 308 (2007) ("Although there have increasingly been suggestions to introduce class actions – at least in limited circumstances – in many other countries, few of those countries have yet acted on them. Among those that have, most are squarely in the common law tradition . . . .") (footnote omitted); Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 Duke J. Comp. & Int'l L. 405, 413 (2001) ("[I]n many civil law systems, there is still widespread and strong resistance toward the acceptance of any full-fledged form of group or class litigation."). As even a proponent of class arbitration has acknowledged:

> [M]any states – particularly civil law systems – have deep-seated concerns about the U.S. model due to fundamental conceptual differences about how individual procedural rights

> operate. . . . Because the right to an individual cause of action is inviolate and cannot be overcome by arguments of social or judicial efficiency, civil law nations resist a wide rule allowing representative actions.

S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. Pa. J. Int'l L. 1, 22-23 (2008).

As these authorities demonstrate, class actions are not internationally accepted. *See also* Eric Tuchmann, *The Administration of Class Action Arbitrations, in Multiple Party Actions in International Arbitration: Consent, Procedure and Enforcement* 325, 334 (Belinda Macmahon ed., 2009). It would therefore thwart the purpose of the arbitration clauses in the ASBATANKVOY and VEGOILVOY charters – which, as noted, is to create neutral systems of dispute resolution that do not depend on country-specific litigation models – to require class arbitration under those clauses. Parties, like the Petitioners, who signed the ASBATANKVOY and VEGOILVOY charters in the period 1998-2002 had no reason to expect that, by signing a silent arbitration clause, they were subjecting themselves to a type of litigation that may well be unknown to their nation's legal system, or even contrary to their nation's deep-seated legal norms. As explained by the American expert in a declaration presented to the arbitrators in this case:

> There is no doubt whatsoever that these [charter] forms would not have been acceptable to the vast majority of owners and

> charterers if these forms had authorized the use of particular national court litigation procedures, such as class actions, for the resolution of disputes under the charter parties. . . . Non-U.S. parties typically have no experience with class actions and would be horrified to learn they could find themselves caught up in a class action case by agreeing to arbitrate in New York, as compared with other leading maritime arbitration centers whose legal systems do not recognize these types of cases . . . .

Kimball Decl., at JA 124a, ¶15-16.

C. Class Actions Are Not Accepted in the International Maritime Arbitral Community

There has never been a class action resolved by international maritime arbitration. Harris Decl., at JA 139a, ¶24; Kimball Decl., at JA 126a, ¶21. As described, *supra*, the participants in a maritime arbitration expect the arbitration to be a bilateral proceeding which will be accomplished quickly and privately. If class actions were to be permitted, the participants doubtless would be greatly surprised and sorely disappointed.

1. The maritime arbitration would not be bilateral.

Class actions are not bilateral. In fact, one of the requirements of a class action is numerosity. *See*

Fed. R. Civ. P. 23(a) ("that the class is so numerous that joinder of all class members is impracticable"); American Arbitration Association, *Supplementary Rules for Class Arbitrations* 4(a)(1) (effective Oct. 8, 2003), at JA 57a. Class actions can involve hundreds, thousands, or even over a million parties. *See, e.g.*, *Grueschow v. Harris*, 492 F. Supp. 419, 422 n.1 (D.S.D. 1980), *aff'd*, 633 F.2d 1264 (8th Cir. 1980) (government benefits) (5,000 class members); *Appleton Elec. Co. v. Advance-United Expressways*, 494 F.2d 126 (7th Cir. 1974) (government regulation) (multi-million member plaintiff class). Therefore, a class arbitration lacks "'the face to face' quality of the very different kind of proceeding described to Congress prior to the FAA's enactment." Clancy & Stein, *supra*, at 64.

2. The maritime arbitration would not be resolved quickly.

Class action "is not prompt, inexpensive, and streamlined," rather it "resolves the claims of many individuals, and, as such, [it] inherently require[s] the staged and deliberate resolution and administration of complex issues." Clancy & Stein, *supra,* at 62.

3. The maritime arbitration would not be private.

Due to the nature of class actions, there would be a multitude of parties, lawyers and expert witnesses,

the very antithesis of the bilateral informality of maritime arbitrations. As explained by Bruce Harris:

> The reason parties agree to arbitrate international maritime disputes in the first place is to accomplish neutral, private commercial dispute resolution without the delay, uncertainty, and complexity of court proceedings. These objectives would be wholly undermined if one party could impose on another a U.S. style class action litigation. Such a proceeding would destroy the privacy and confidentiality of the arbitral process, would eliminate the ability of each party involved to influence the selection of the tribunal, and would subject the parties to a complex national court litigation process which is both unfamiliar and unsuited to maritime disputes.

Harris Decl., at JA 138a, ¶21.

In light of the foregoing, class arbitrations have not been and would not be accepted by the maritime arbitral community. The two maritime arbitration experts, discussed above, one from New York and one from London (the other principal site of international maritime arbitrations), presented undisputed evidence below that class arbitrations are wholly foreign to maritime practice. In the words of John Kimball, the New York expert: "Allowing class action arbitration under one of the[ ] charter parties [at issue in this case] would be more than unprecedented. It would be entirely inconsistent with the expectations of the thousands of parties who have

chosen New York as the situs for international maritime arbitrations[.]" Kimball Decl., at JA 126a, ¶21. Similarly, Bruce Harris, who has been appointed as an arbitrator in over eight thousand maritime arbitrations over the past twenty-five years in London affirmed:

> Whatever the status of class action arbitrations in other fields in the U.S., there is no precedent of which I am aware for a class action maritime arbitration in the U.S. or elsewhere. . . . None of the arbitrator colleagues . . . to whom I have spoken have ever heard of the idea. Nor would they be prepared to entertain it any more than I would.

Harris Decl., at JA 139a, ¶24.

These uncontroverted expert declarations are fully supported by the experience of the SMA. As explained in a forthcoming article jointly written by a past president and the current vice-president of the SMA:

> The question of potential class arbitrations under the SMA Rules has been brought up for discussion periodically, and the SMA has each time noted the total absence of a tradition for class arbitration in maritime disputes (a view also shared by our colleagues in London) and has unanimously concluded that it generally sees no place for class arbitration in maritime disputes.

Manfred W. Arnold & Bengt E. Nergaard, *Does an Arbitration Clause Providing for Arbitration in New York Imply that the Parties Agree to Class Arbitration Proceedings?* (Int'l Conference of Mar. Arbitrators, forthcoming Oct. 2009) (manuscript at 5).

The SMA Rules do have a provision for consolidated arbitration, which means that, if parties incorporate the SMA Rules into their arbitration agreement, they consent to consolidated arbitration.[10] However, because there is no precedent for class arbitration in maritime disputes, "[i]t was, therefore, considered sufficiently implied in the SMA Rules that they did not apply to class action arbitrations so that an express statement to this effect was not necessary." *Id.*

In the wake of the decision in this case by the Second Circuit, however, the SMA decided that "even if restating the obvious, it was appropriate to amend its Rules by including a specific reference to class actions." *Id.* (manuscript at 10). As a result, the SMA added the following sentence to its consolidation provision: "However, claims on behalf of or against a class are prohibited from being submitted to arbitration under these Rules." Society of Maritime Arbitrators, Inc., *Maritime Arbitration Rules* § 2

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[10] The charters in this case do not incorporate the SMA Rules into their arbitration clauses. *See* JA at 30a, 50a-52a. Amici nonetheless discuss the SMA Rules because they are illustrative of the settled understanding in international maritime law rejecting class arbitration.

(effective Mar. 19, 2009), *available at* http://www.smany.org/sma/about6-1.html. As discussed, there was nothing innovative about this amendment: it simply reflects the well-settled transnational understanding that, absent an explicit agreement to the contrary, parties to maritime charters do not intend to subject themselves to class arbitration.

D. Because Class Actions Are Alien to Maritime Arbitration, It Is Unreasonable to Interpret Silence in the Arbitration Clauses at Issue Here to Mean That the Parties Consented to Class Arbitration

The Federal Arbitration Act "declares a national policy favoring arbitration," to the extent that, and only to the extent that, the parties have contracted to settle their disputes through arbitration. *Preston v. Ferrer*, 128 S. Ct. 978, 983 (2008) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)). As this Court explained in *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985), "[t]he Act, after all, does not mandate the arbitration of all claims, but merely the enforcement – upon the motion of one of the parties – of privately negotiated arbitration agreements." Therefore, it is axiomatic that the scope of an arbitration cannot go beyond that which the parties have contractually consented to arbitrate. "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt*

Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989); *see also United Steelworkers v. Warrior & Gulf Navig. Co.*, 363 U.S. 574, 582 (1960) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

This means that a court cannot compel multi-party arbitration absent prior consent by all of the affected parties. For example, in *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19-20 (1983), the Court recognized that two related disputes involving three separate parties would have to be resolved in two different forums: two of the three parties had agreed to resolve their disputes by arbitration and were required to do so, but the third had not entered into an arbitration agreement and "cannot be sent to arbitration without [its] consent."

Similarly, where an arbitration agreement between two parties is silent as to class arbitration, those parties have not consented to class arbitration and cannot be required to subject themselves to it. As the Seventh Circuit has explained:

> The parties' arbitration agreement makes no mention of class arbitration. For a federal court to read such a term into the parties' agreement would "disrupt the negotiated risk/benefit allocation and direct the parties to proceed with a different sort of arbitration."

Champ v. Siegel Trading Co., 55 F.3d 269, 275 (7th Cir. 1995) (quoting *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 10 (1st Cir. 1988) (Seyla, J., dissenting) (alterations omitted)).[11]

These principles apply with special force in the maritime context. As discussed, maritime arbitration is unique in a number of important respects: (i) maritime arbitrations rarely involve the consumer protection, negative value cases that are the primary objective of class actions, (ii) the international character of maritime commerce means that maritime arbitration agreements must be interpreted consistently with the expectations of parties from around the world – many of which are from legal systems that reject class actions, (iii) maritime arbitration clauses generally envision that non-lawyer shipping persons, who lack training or

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[11] In *Champ*, the Seventh Circuit relied heavily on decisions by six other circuits holding that courts could not require consolidated arbitration where the parties' arbitration agreement was silent on the point. *See* 55 F.3d at 274-75. As explained by one those decisions, "[i]t is clear the parties here did not consent to joint arbitration" because there was no provision for consolidated arbitration in their contracts; therefore, the parties could not be required to proceed with consolidated arbitration. *Weyerhaeuser Co. v. W. Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984); *see also, e.g., Protective Life Ins. Corp. v. Lincoln Nat. Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989) (per curiam) ("Parties may negotiate for and include provisions for consolidation of arbitration proceedings in their arbitration agreements, but if such provisions are absent, federal courts may not read them in.").

experience with the procedural complexities of class arbitrations, serve as arbitrators, and (iv) maritime arbitrations are bilateral, private and speedily determined. Under these circumstances, it would be nothing more than a legal fiction to presume that parties intended to subject themselves to class arbitrations by signing bilateral arbitration clauses in transnational maritime charters. This Court's precedent, which holds that parties "cannot be sent to arbitration without [their] consent," *Moses H.*, 460 U.S. at 19-20, leaves no room for such fiction.

III. Imputing Consent to Class Arbitrations Based on Silent Agreements Will Be Disruptive to the Maritime Industry and Discourage Parties From Consenting to Arbitration in the United States

Businessmen bear risks for which they are rewarded if they have calculated correctly and punished if they have not. It is essential, in calculating those risks, that they be confident that the terms of the agreement embodying those risks are uniformly interpreted and consistently applied. As stated by this Court "orderliness" and "predictability" are "essential to any international business transaction." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974). Permitting arbitrators to impose class actions in silent arbitration provisions would undermine that confidence and lead to disruption and frustration.

A. Permitting Class Actions in Maritime Arbitrations Would Expose the Awards to Challenge Under Article V of the New York Convention

Because of the limited right of appeal, the most vigorous challenge to an international class arbitration will arise in the enforcement stage under the New York Convention. *See* S.I. Strong, *Legal Research Paper Series Research Paper No. 2009-04: The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity*, at 4, 77 (2009), *available at:* http://ssrn.com/abstract=1359353. In particular, the successful class action party seeking to enforce the award will be faced with challenges under Article V(1)(c), (1)(d) and V(2)(b) of the New York Convention. Those sections provide for the court in the foreign country to refuse to recognize and enforce the award if:

> 1(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration,. . . .
>
> [or]
>
> 1(d) [t]he arbitral procedure was not in accordance with the agreement of the parties,. . . .
>
> [or]

> 2(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

New York Convention, *supra*, n.2; 9 U.S.C. § 201.

To date, there have been no known actions outside the United States to enforce a class action award arising out of a U.S.-based class arbitration. Strong, *The Sounds of Silence, supra,* at 21. If a foreign court were to consider class actions unsupportable under its own laws, it could deny recognition or enforcement of the class action award under paragraphs (c) or (d) of Article V(1) or paragraph (b) of Article V(2).

B. Inserting a Contractual Provision Barring Class Actions Is No Answer

Charter parties are negotiated and agreed by commercial men employed usually in the chartering departments of their employers. Their training usually includes an apprenticeship at a charter brokerage company. Many have sea experience. Hardly any have legal experience. Lawyers play no role in negotiating charter parties. Indeed, all but the largest shipping companies do not have in-house counsel. Lawyers get involved only when a dispute arises that cannot be resolved commercially. Asking commercial persons to protect themselves from risks of which they are unaware is unrealistic. At best, the education of shipping persons to this risk would take

considerable time with the results uneven and difficult to gauge. The consequence would more likely be a rejection of the place where the risk exists rather than the crafting of a contractual provision to avoid the risk. In the meantime, there would be innumerable charters that predate the cure, likely thousands which are long-term contracts and all of which include unprotected arbitration provisions that would lie in wait for the unfortunate who would be affected.

C. Imposing Class Actions in Maritime Arbitration Will Further Deter Maritime Companies From Choosing to Arbitrate in the United States

All modern charter party forms contain a dispute resolution form that includes the place where the dispute will be resolved. Schoenbaum, *supra*, § 11-19, at 47. Many forms include a choice in which the parties select New York or London (the two principal maritime centers) or a mutually agreed place. This Court has acknowledged the importance of selecting, in advance, a dispute resolution forum:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

Scherk, 417 U.S. at 516.

Not only is the incorporation of a forum selection clause "indispensable," the actual place that is to be selected in international maritime contracts is of consequential importance:

> [I]t would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with consequences of the forum clause figured prominently in their calculations.

The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 14 (1972).

Imposing class actions in an international maritime arbitration, notwithstanding that the dispute resolution provision is silent, would deter parties from selecting the United States as the dispute resolution situs. The English maritime arbitration expert, Bruce Harris, stated that shipowners and charterers, who become aware that a silent maritime arbitration would expose them to class actions, "would almost always prefer another arbitral situs." Harris Decl., at JA 142a, ¶20. Similarly, John Kimball declared that foreign shipowners and charterers would "veto" New York as the arbitral situs if they became aware that silent arbitration provisions could lead to class actions against them. Kimball Decl., at JA 124a-125a, ¶16. He added that it would be "hard to imagine" major oil company charterers would subject themselves to class actions by agreeing to arbitrate in New York. *Id.* A.S.B.A., the group representing the American shipbrokers and ship agents (and one of the *amici*), cautions that

if silent arbitration clauses were construed as suggested by the Respondent, foreign companies would look elsewhere for trading partners. A.S.B.A. Cert. Br. 7.

Imposing class arbitration involuntarily on the international maritime community would place New York (and the United States) in a significantly disadvantageous position when parties decide the arbitral forum in which to have their potential disputes resolved.

CONCLUSION

The judgment should be reversed.

Dated: New York, New York
September 4, 2009

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AMICUS CURIAE BRIEF

(12)

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SUPREME COURT
SEP 4 - 2009

IN THE

Supreme Court of the United States

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL US, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation of businesses and associations, with an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every relevant economic sector and geographical region of the country. An important function of the Chamber is the representation of its members' interests by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

Many of the Chamber's members and affiliates routinely utilize agreements to arbitrate in their business contracts. By agreeing to arbitrate, they are able to avoid costly and time-consuming litigation over disputes arising out of and relating to these contracts by submitting to a streamlined, yet fair process based upon the mutual consent of the parties.

Unlike litigation, private arbitration is a matter of consent, not coercion. Compelling parties to resolve disputes through costly, time-consuming and high-stakes class arbitration, where the parties have not expressly agreed to do so, frustrates the parties' intent, undermines their existing agreements, and erodes the benefits offered by arbitration as an

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[1] Pursuant to Rule 37.6, no counsel for any party to these proceedings authored this brief, in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person, aside from the *amicus curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Petitioners and respondent have submitted letters reflecting blanket consent to the filing of *amicus* briefs and such letters have been filed with the Clerk.

alternative to litigation. Imposition of class arbitration on a "silent" agreement is contrary to the central goal of the Federal Arbitration Act: To ensure that written agreements to arbitrate are enforced in accordance with the terms adopted by the parties.

Parties agree to arbitrate because it offers them an alternative to the dispute resolution processes already available in courts. The FAA ensures not only that private agreements to arbitrate are enforceable, but also that hostility to arbitration is not permitted to remake agreements to arbitrate to replicate the most expensive and formal aspects of court litigation when the parties have not agreed to follow such procedures. The Chamber and its members thus have a vital interest in having this Court reverse the decision below, which held that class arbitration may be imposed by an arbitrator in a proceeding involving a "silent" arbitration agreement.

INTRODUCTION AND SUMMARY

In the wake of *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003) (plurality opinion), arbitrators increasingly have been asked to determine whether to impose class arbitration in cases where the parties' agreement contains no language addressing the availability of class arbitration. Under the FAA, private agreements to arbitrate must be "enforced according to their terms." *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 479 (1989). Parties are entitled not only to choose arbitration over litigation, but "also the procedure to be used in resolving the dispute." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). The command that agreements to arbitrate "shall be valid, irrevocable, and enforceable" is binding both on

courts, 9 U.S.C. § 2, and also on arbitrators who are "bound to effectuate the intentions of the parties." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636 (1985).

Under generally applicable contract law, a contract may not be rewritten to add terms that fundamentally transform the agreement into something the parties have not agreed to do. Instead, an additional term may be supplied only when "essential to a determination of [the parties'] rights and duties" and "reasonable in the circumstances." *Restatement (Second) of Contracts* § 204 (1981); see also 11 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 31:7 (4th ed. 1999) (terms may be added in the face of silence only where "the parties must have intended them and must have failed to express them only because of sheer inadvertence or because they are too obvious to need expression."). It is neither essential nor reasonable under the circumstances to assume – in the face of silence – that the parties to an arbitration agreement intended to authorize class arbitration.

First, as a general matter, class arbitration, and the extensive, formal procedures that it necessarily entails, is not "essential to a determination of [the parties'] rights." *Restatement (Second) of Contracts* § 204. A principal advantage of traditional arbitration is that it allows parties to avoid "'the delay and expense of litigation,'" and it thus "appeal[s] 'to big business and little businessalike, . . . corporate interests [and] individuals.'" *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995) (quoting S. Rep. No. 68-536, at 3 (1924)). As this Court has explained, arbitration "often would seem helpful to individuals . . . who need a less expensive alternative to litigation." *Id.* (noting that arbitration "'is usually

cheaper and faster than litigation; it can have simpler procedural and evidentiary rules'"). Imposition of class arbitration – which is the antithesis of the informality and expeditious nature of traditional arbitration – is thus in no sense "essential" to an agreement to arbitrate.

Second, imposition of class arbitration in the face of a "silent" agreement is not "reasonable in the circumstances." Arbitration provides an alternative to litigation precisely because it allows the parties to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors*, 473 U.S. at 628. In contrast, class arbitration is a "hybrid" proceeding that entails substantially more "external supervision" by courts than traditional arbitration. *Keating* v. *Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd on other grounds sub nom.* 465 U.S. 1, 16 (1984); see also *Discover Bank* v. *Superior Court*, 113 P.3d 1100, 1106 (Cal. 2005) (class arbitration is a "hybrid procedure"). Class arbitration is thus in fundamental respects a stark break from traditional notions of private arbitration.

Under generally applicable contract law, it is not reasonable to conclude that the parties, by agreeing to arbitrate, intended through their silence to transform fundamentally the nature and the scope of traditional arbitration. Class arbitration (i) raises due process issues that require the arbitrator to follow complex and time-consuming procedures (procedures already available in litigation), (ii) exponentially raises the stakes of a single arbitral decision, and (iii) at the same time largely insulates that high-stakes decision from judicial review that would occur as a matter of course in class-action litigation. Neither defendants nor absent class

members reasonably expect to bind themselves to proceed in such a cumbersome fashion by signing an agreement to arbitrate that says nothing about class arbitration.

Finally, the FAA prohibits courts and arbitrators from applying different, arbitration-specific rules of contract law to impose class arbitration on "silent" agreements to arbitrate. See *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 686-87 (1996); *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987).

ARGUMENT

I. THE FAA MANDATES THAT AGREEMENTS TO ARBITRATE BE ENFORCED, UNDER GENERALLY APPLICABLE CONTRACT PRINCIPLES, IN ACCORDANCE WITH THEIR TERMS.

Section 2 of the FAA provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This broad provision – the "centerpiece" of the FAA – is "at bottom a policy guaranteeing the enforcement of private contractual arrangements." *Mitsubishi Motors*, 473 U.S. at 625. Section 2 likewise reflects that Congress's "primary purpose" is not only requiring that agreements to arbitrate be enforced, but also "ensuring that private agreements to arbitrate are enforced *according to their terms*." *Volt*, 489 U.S. at 479 (emphasis added).

Congress enacted the FAA against a backdrop of hostility by the judiciary to agreements to arbitrate. It sought "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate" by placing them "'upon the same footing as other contracts.'"

Dean Witter Reynolds, Inc. v. *Byrd*, 470 U.S. 213, 219-20 (1985) (quoting H.R. Rep. No. 68-96, at 1 (1924)). As this Court has explained, the FAA requires that arbitration agreements must be enforced and interpreted under the same principles of contract law applicable generally to any other contract. See, *e.g.*, *Doctor's Assocs.*, 517 U.S. at 686-87; *Perry*, 482 U.S. at 492 n.9. That core obligation applies both to courts as well as to arbitrators, who are "bound to effectuate the intentions of the parties." *Mitsubishi Motors*, 473 U.S. at 636; *accord 14 Penn Plaza LLC* v. *Pyett*, 129 S. Ct. 1456, 1467 (2009) ("'the arbitrator's task is to effectuate the intent of the parties'") (quoting *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 53 (1974)).

As with any contract, "parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. Parties may choose to limit the types of claims subject to arbitration, see *Mitsubishi Motors*, 473 U.S. at 628, or they may select particular rules and procedures that will govern the manner in which their arbitration proceeds, see *Volt*, 489 U.S. at 479; *Scherk*, 417 U.S. at 519. In this respect, arbitration differs markedly from litigation because an agreement to arbitrate is "a matter of consent, not coercion." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 294 (internal quotation marks omitted). As a result, an arbitrator "'has no general charter to administer justice for a community which transcends the parties,'" but is instead "'part of a system of self-government created by and confined to the parties.'" *United Steelworkers of Am.* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960). Put simply, "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration."

AT&T Techs., Inc. v. *Communications Workers of Am.*, 475 U.S. 643, 648-49 (1986).

Application of these bedrock principles confirms that class arbitration cannot be imposed upon a "silent" agreement to arbitrate.

II. GENERALLY APPLICABLE CONTRACT LAW DOES NOT PERMIT IMPOSITION OF CLASS ARBITRATION UPON A SILENT ARBITRATION AGREEMENT.

Under generally applicable contract law, parties are bound by the terms of their agreement, and those agreements may not be rewritten by courts or arbitrators to add provisions that the parties could have, but did not, include.

When the terms of an agreement are "silent" on a matter, an additional term may be supplied only if (i) "essential to a determination of [the parties'] rights and duties," *and* (ii) "reasonable in the circumstances." See *Restatement (Second) of Contracts* § 204; see, *e.g.*, *Vermont Teddy Bear Co.* v. *538 Madison Realty Co.*, 807 N.E.2d 876, 879 (N.Y. 2004) ("[C]ourts may not by construction add or excise terms . . . and thereby make a new contract for the parties under the guise of interpreting the writing") (internal quotation marks omitted); 11 Williston & Lord, *supra*, § 31:7 (terms may be added to a "silent" agreement only where "the parties must have intended them and must have failed to express them only because of sheer inadvertence or because they are too obvious to need expression").

For example, under the FAA, courts have repeatedly rejected claims that an arbitration agreement cannot be enforced because it fails expressly to state that, by agreeing to arbitrate, the parties are waiving their right to a jury trial. *E.g.*,

Pierson v. *Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984) ("loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate").[2] In such cases, an agreement to arbitrate necessarily, reasonably and obviously implies a waiver of a jury trial. The parties' "silence" on this issue is of no moment; it is "too obvious to need expression." 11 Williston & Lord, *supra*, § 31:7. As shown below, the parties' consent to class arbitration is neither essential to an agreement to arbitrate nor reasonable under the circumstances.

A. Class Arbitration Is Not An Essential Aspect Of An Agreement To Arbitrate.

Class arbitration is not an "essential" part of an agreement to arbitrate. To the contrary, class arbitration reflects a stark break from traditional arbitration, whereby a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors*, 473 U.S. at 628.

1. Class arbitration is fundamentally different than traditional arbitration. The earliest decisions addressing class arbitration recognized this fact, explaining that class arbitration necessarily "entail[s] a greater degree of judicial involvement than is normally associated with arbitration," which is

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[2] *See also Snowden* v. *Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (jury trial waiver, though not expressly provided, was implicit as a "'necessary'" and "'obvious'" consequence of the arbitration agreement); *Robert Bosch Corp.* v. *ASC Inc.*, 195 F. App'x 503, 507 (6th Cir. 2006) ("the loss of the right to a civil jury trial is a fairly obvious consequence of failing to object to an arbitration clause and, therefore, does not require an express waiver") (internal quotation marks omitted).

"ideally a complete proceeding, without resort to court facilities." *Keating*, 645 P.2d at 1209 (internal quotation marks omitted). Following California's lead, Pennsylvania courts recognized that "[c]lass-wide arbitration is a different animal" than traditional arbitration because of the required resort to judicial remedies. *Dickler* v. *Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 & n.5 (Pa. Super. Ct. 1991).[3] These courts viewed class arbitration as a "hybrid" method of dispute resolution that requires judicial intervention concerning "certification and notice to the class" and "external [court] supervision . . . to safeguard the rights of absent class members to adequate representation and in the event of dismissal or settlement." *Discover Bank*, 113 P.3d at 1106. See also *Keating*, 645 P.2d at 1209; *Dickler*, 596 A.2d at 866 & n.5.

To be sure, this Court has recognized that, in court litigation, class actions may allow some cases to move forward collectively "which would be uneconomical to litigate individually." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 809 (1985). Traditional individual arbitration, however, serves the same

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[3] Both *Keating* and *Dickler* held that arbitrators cannot, without judicial oversight, certify classes, administer notice, or conduct related proceedings. *Keating*, 645 P.2d at 1209 ("The court would have to make initial determinations regarding certification and notice to the class, and if classwide arbitration proceeds it may be called upon to exercise a measure of external supervision in order to safeguard the rights of absent class members to adequate representation and in the event of dismissal or settlement."); *Dickler*, 596 A.2d at 866 & n.5 (court would need to "certify the class," "to insure that notice is provided for," and "to have final review in order to insure that class representatives adequately provide for absent class members"). None of this, of course, is provided in any contractual agreement to arbitrate.

function. It offers "streamlined proceedings and expeditious results [that] will best serve [the parties'] needs" and will "keep the effort and expense required to resolve a dispute within manageable bounds." *Mitsubishi Motors*, 473 U.S. at 633. As explained earlier this year, "'[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance [in cases that] involve[] smaller sums of money than disputes concerning commercial contracts." *14 Penn Plaza*, 129 S. Ct. at 1464 (quoting *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 123 (2001)). Indeed, arbitration is favored because it allows claims that might have been uneconomical if pursued in court to proceed given the favorable "economics of dispute resolution." *Id.*

In all events, the FAA does not permit agreements to be rewritten merely because different procedures than the ones agreed to by the parties might be more efficient. See *Dean Witter*, 470 U.S. at 221 (FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement") (internal quotation marks omitted).

2. The Supplementary Rules for Class Arbitration adopted by the American Arbitration Association (AAA) confirm that class arbitration is markedly different from traditional arbitration.

First, consistent with the views expressed in *Keating* and *Dickler*, the AAA's rules reflect significant court interaction throughout the arbitral proceeding. Under those rules, the arbitrator (i) makes an assessment "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class," and (ii) then "stay[s] all proceedings following the issuance of [that award] for a period of at least 30 days to permit any party to

move a court of competent jurisdiction to confirm or to vacate [that award]." AAA, Supplementary Rules for Class Arbitrations, Rule 3 (effective date Oct. 8, 2003), *available at* http://www.adr.org/sp.asp?id=21936.

Second, the arbitrator must then assess whether an arbitration should proceed as a class by analyzing the factors such as numerosity, commonality, typicality and adequacy of representation. *Id.* Rule 4. Following that decision, the arbitrator again must "stay all proceedings following the issuance of [that decision] for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate [that award]." *Id.* Rule 5(d).

Third, to satisfy the minimum due process requirements necessary to bind absent class members, class arbitration necessarily must incorporate the same complex procedures that have been deemed essential in class action litigation. For example, in *Hansberry* v. *Lee*, 311 U.S. 32 (1940), the Court held that, under the Due Process Clause, non-parties may not be bound by a judgment unless there has been a determination that they were "adequately represented by parties who are present." *Id.* at 42-43. In *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), the Court explained that Rule 23 "incorporat[es] . . . due process standards" and requires that "notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort." *Id.* at 173. And, in *Phillips Petroleum*, 472 U.S. at 808, the Court explained that "absent parties" may be bound by a judgment only if "the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest." *Id.*

Consistent with these principles, the AAA's Class Arbitration Rules adopt detailed procedures in an effort to satisfy due process. Specifically, the arbitrator must make findings that track the procedural requirements of Rule 23 of the Federal Rule of Civil Procedure, including the question of adequacy of representation and typicality of claims. AAA, *supra*, Rule 4. Further, in contrast to traditional litigation, where the parties' dispute is kept confidential, the AAA's rules require that in a class arbitration there be notice to potential class members, *id.* Rule 6(a), and that potential class members be permitted to request exclusion from the class, *id.* Rule 6(b)(5).

In short, class arbitration is in no sense an "essential" aspect of an agreement to arbitrate, but instead reflects a sharp break from the traditional understanding of arbitration as an informal and confidential means of resolving disputes quickly and efficiently.

B. It Is Not "Reasonable" To Conclude That The Parties Agreed To Proceed Via Class Arbitration Without Saying So In Their Agreement.

The parties cannot be deemed to have reasonably consented to class arbitration by remaining silent on the issue. To be sure, parties to an arbitration agreement can, subject to due process constraints, agree to arbitrate their disputes on a classwide basis. See *Volt*, 489 U.S. at 479. The question here, however, is whether a term compelling class arbitration can be added to a "silent" agreement on the assumption that class arbitration is something the parties actually intended or is "too obvious to need expression." Quite simply, it is unreasonable to make such an assumption about the parties' intent.

First, the very concept of class arbitration is a relatively recent development. Although the FAA was enacted in 1925, the first serious analysis of class arbitration occurred more than 50 years later, when the California Court of Appeal addressed the question whether class arbitration was even possible and, if so, what sort of extraordinary protections courts would need to provide. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 38 (2000) (citing *Keating* v. *Superior Court*, 167 Cal. Rptr. 481 (Cal. Ct. App. 1980), *vacated*, 645 P.2d 1192 (Cal. 1982), *rev'd on other grounds sub nom.* 465 U.S. 1, 16 (1984)). In light of this limited commercial history of class arbitration, including, until very recently, the lack of any guidance regarding how such an arbitration should actually proceed, it is purely fanciful to believe that the parties to a "silent" arbitration agreement consented to class arbitration.[4]

Here, it is implausible that the parties assumed that they could be compelled to submit to class arbitration absent an *express* agreement to do so because, before 2003, the overwhelming majority of courts to consider the issue had ruled that class arbitration could not be compelled in the face of a "silent" agreement. As the Seventh and Fourth

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[4] The American Arbitration Association ("AAA") did not publish rules addressing class arbitrations until 2003, after this Court's ruling in *Bazzle*. *See* AAA, *supra*. The arbitration agreement at issue in this case, and the dispute that transpired under it, all predate the adoption of these rules. *See Stolt-Nielsen SA* v. *AnimalFeeds Int'l Corp.*, 548 F.3d 85, 87-88 (2d. Cir. 2008). After the district court held the dispute arbitrable, the parties agreed to follow AAA Supplementary Rules 3-7, for purposes of determining whether the parties agreed to permit class arbitration.

Circuits have explained: "'When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial.'" *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 276 (7th Cir. 1995) (quoting *Burton* v. *Bush*, 614 F.2d 389, 390 (4th Cir. 1980)). And, "[o]ne of those 'procedural niceties' is the possibility of pursuing a class action under Rule 23." *Id.* It would be unreasonable to presume that the parties sought an alternative to court litigation but nevertheless agreed, *sub silentio*, to resolve disputes in a classwide proceeding before an arbitrator in a manner that mirrors the procedures available in court litigation.

Second, it would be even more unreasonable to conclude that a prospective defendant would have agreed to class arbitration by being "silent" on the subject. Even in litigation, class actions under Federal Rule of Civil Procedure 23 are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamasaki*, 442 U.S. 682, 700-01 (1979). By enabling a class representative to prosecute an action on behalf of absent class members, judicial class actions enable a court to issue an order that is binding on all members of the class. See *Hansberry*, 311 U.S. at 40-41 (class actions are a "recognized exception" to the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process"). In so doing, judicial class actions protect defendants from the inconsistent obligations that might result from individual successive suits by each class member.

See *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 402-03 (1980).

The defendant in a class arbitration brought by a single claimant under a "silent" arbitration agreement may not be afforded this same protection. Regardless of the procedures adopted by an arbitrator, absent class members might attempt to avoid the consequences of an adverse class-wide determination by arguing that the arbitration process did not provide them with sufficient due process protections to bind them to the results, especially given that they had not agreed to allow another party to enforce their contractual rights. *Cf. Phillips Petroleum*, 472 U.S. at 811-12.

Due process requires that the court supervise class representation to ensure that "the named plaintiff at all times adequately represent[s] the interests of the absent class members." *Id.* at 812 (citing *Hansberry*, 311 U.S. at 42-43, 45). In a class arbitration, however, the arbitrators are selected by the named parties, and the absent class members may legitimately object that the arbitrators were selected without any input from them. See Sternlight, *supra*, at 113 ("it is difficult to see how such an arbitrator would play the role of the court in checking possible self-dealing").

Third, it would be unreasonable to conclude, in the face of silence, that a party to a contract has agreed to allow a non-party to that contract the right to enforce the party's contractual rights. Arbitration is a matter of contract, and "[i]t goes without saying that a contract cannot bind a nonparty." *Waffle House*, 534 U.S. at 294. Where each class member's contract expressly provides for class arbitration, each may be obligated to submit to binding class arbitration under the representation of another. But,

where each contract is "silent" on the issue of class arbitration, the absent class members have a compelling argument that they did not consent to having their claims prosecuted by a class representative before arbitrators who were not selected in accordance with their individual contracts. *Cf. Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) ("the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties").

As this Court explained long ago, "'Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement to which he is not a party, he must, at least, show that it was intended for his direct benefit.'" *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303, 307 (1927) (Holmes, J.) (quoting *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U.S. 220, 230 (1912)). Thus, the general rule is that a non-party to a contract "may enforce the duty" created by a contract only if the contract was intentionally made for the benefit of that non-party. See *Restatement (Second) of Contracts* §§ 302, 304.

Here, imposition of class arbitration in the face of a silent agreement violates these principles because it permits a non-party to a contract for which the non-party is not an intended beneficiary, to sue for the breach of that contract. To be sure, parties can authorize such a result by providing that class arbitration is an intended and available method of resolving disputes, but nothing of the sort is reflected in the parties' agreement.

Finally, these concerns are compounded by the heightened stakes associated with the aggregation of hundreds or thousands of individual claims in a single proceeding. Class arbitration has the effect of

concentrating all of the risk of substantial damages awards in a single arbitration. As such, the outcome of a single arbitration could have dramatic consequences for a defendant. In a judicial class action, the potential for enormous liability is tempered by a more liberal provision for interlocutory appeals that enables a party to seek review not just of the final judgment, but also specifically of the class certification decision. See Fed. R. Civ. P. 23(f).

Notwithstanding the greater stakes at issue, review of the arbitrator's substantive rulings is not as broad as that available in an appeal from a trial court decision and cannot be expanded by agreement. See *Hall St. Associates, L.L.C.* v. *Mattel,* 128 S. Ct. 1396, 1403 (2008); *cf. Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987) ("[A]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure arbitrators comply with the requirements of the statute"). Although a trade-off between efficiency and procedural protections may be reasonable where the parties expect to deal with a single claim, the trade-off becomes unthinkable when the outcome of a single arbitration has classwide consequences.

The same holds true for absent class members, who could be left in a situation in which the courts may be unable to correct substantive errors in a decision by arbitrators they did not select and before whom their representation may not have been adequate. There is little reason to assume that absent class members would have consented to such treatment of their claims without saying so expressly in their agreement to arbitrate.[5]

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[5] Although the binding effect of class arbitration on absent class members is not settled, to be effective, class arbitration

C. The FAA Precludes The Application of Arbitration Specific Rules That Would Permit Imposition Of Class Arbitration On A Silent Agreement.

As shown above, imposition of class arbitration on a "silent" agreement to arbitrate violates generally applicable principles of contract law. If, however, a State's law imposes different standards on agreements to arbitrate – thereby allowing class arbitration to be superimposed on a "silent" agreement – the FAA would then require that agreements to arbitrate nevertheless be enforced in accordance with generally applicable contract principles. See *Perry*, 482 U.S. at 492 n.9 ("[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally") (emphasis in original); *Allied-Bruce Terminix*, 513 U.S. at 272 (FAA's displacement of conflicting state law is "well-established").[6]

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proceedings nonetheless must operate under the premise that their results will resolve issues on a class-wide basis. See, e.g., AAA supra, Rule 8(a)(3) ("The arbitrator may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.").

[6] *Cf.* Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 62 (2005) ("California has created a new brand of unconscionability. It is far more demanding – and it is unique to arbitration."); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buff. L. Rev. 185, 186 (2004) ("[J]udges find unconscionable specific features of arbitration agreements, such as forum selection clauses and confidentiality requirements, which are routinely enforced as unobjectionable

1. This Court has invalidated state laws that frustrated the parties' agreement to arbitrate. See, *e.g.*, *Preston* v. *Ferrer*, 128 S. Ct. 978, 981 (2008) (FAA supersedes state law requiring parties to a valid arbitration agreement instead to submit disputes under that statute to an administrative agency); *Doctor's Assocs.*, 517 U.S. at 683 (FAA supersedes state law invalidating arbitration agreements that are not noticed on the first page of a contract); *Perry*, 482 U.S. at 491-92 (FAA supersedes state law providing that state law actions for the collection of wages may be maintained without regard to any arbitration agreement); *Southland Corp.* v. *Keating*, 465 U.S. 1, 16 (1984) (FAA supersedes state law requiring judicial consideration of claims brought pursuant to that statute regardless of parties' agreements to arbitrate). There can thus be no dispute that the FAA invalidates the application of state contract law to the extent that it singles out arbitration for different or less favorable treatment.

Significantly, the FAA mandates displacement not only of rules that keep parties out of arbitration altogether, but also of arbitration-specific rules that allow arbitration to proceed, but recast the arbitration in ways contrary to the parties' intent. See *Southland*, 465 U.S. at 13-14. Indeed, one of the problems that Congress sought to address in enacting the FAA was that courts often would permit arbitration, but only pursuant to procedures supplied by state statute that did not accord with the parties'

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in nonarbitration agreements."); Stephen J. Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 Wake Forest L. Rev. 1001, 1034 (1996) ("Judicial decisions apply unconscionability, and other common law doctrines, more aggressively to arbitration agreements than to other contracts.").

private agreements. See *id.* (citing *Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 8 (1923)); see also *Scherk*, 417 U.S. at 519 (parties entitled to choose "the procedure to be used in resolving the dispute").

Because generally applicable rules of contract law apply, the FAA does not permit "silence" to be treated as a license fundamentally to transform the parties' agreement into a class arbitration – whether that transformation is effected by a court or an arbitrator.

2. Prior to this Court's decision in *Bazzle*, the Second Circuit (in addition to others) had held that the FAA prohibits a compelled class arbitration when the agreement is silent, and thus a district court is without power to compel class arbitration under such an agreement. *Government of U.K.* v. *Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993); see also *Glencore, Ltd.* v. *Schnitzer Steel Prods. Co.*, F.3d 264, 268 (2d Cir. 1999). In the post-*Bazzle* decision below, however, the Second Circuit permitted a panel of arbitrators to do precisely what it held a district court could not do. *Stolt-Nielsen SA* v. *AnimalFeeds Int'l Corp.*, 548 F.3d 85, 99 (2d Cir. 2008).

The decision in *Bazzle* does not give arbitrators a license to rewrite arbitration agreements. The *Bazzle* plurality did not purport to establish the rule of decision to be applied where there is a dispute over whether the parties agreed to permit class arbitration. 539 U.S. at 452-53 (plurality opinion). Changing the initial decision-maker from a court to the arbitrator should not affect the substantive rules to be applied. See *McMahon*, 482 U.S. at 232 (arbitrators must "follow the law"); *Mitsubishi Motors*, 473 U.S. at 628 (a party to an arbitration "does not forgo the substantive rights afforded by the statute"). That essential point is critical because, as

noted, the FAA limits the grounds on which a court may overturn an arbitral decision. See *Hall Street*, 128 S. Ct. at 1403-05.

3. This case offers a perfect illustration. The Second Circuit misinterpreted *Bazzle*. It held that *Bazzle* "abrogated" *Boeing* and *Glencore* "to the extent that they read the FAA to prohibit" class arbitration on "silent" agreements. *Stolt-Nielsen*, 548 F.3d at 100. Having made this error, the court below ruled that it was obligated to defer to the arbitrators' determination. *Id.* at 99. Under this misreading of *Bazzle*, parties to arbitration agreements are faced with the prospect that arbitrators will impose class arbitrations to which the parties never agreed, and that courts will default on their obligation to police the limits of the authority conferred on the arbitrators by the parties' agreement. That result would substitute coercion for consent, in violation of the core requirements of the FAA.

* * * *

Under the FAA, imposition of class arbitration in the face of a "silent" agreement is contrary to generally applicable contract standards, which prohibit agreements from being rewritten to add terms that the parties could have included, but did not. It is patently unreasonable to conclude that parties to an arbitration contract agreed to alter fundamentally the nature, the stakes, and the costs and benefits associated with traditional arbitration without saying so in their contracts.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

Respectfully submitted,

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Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CTIA—THE WIRELESS ASSOCIATION® AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF CTIA—THE WIRELESS ASSOCIATION® AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

CTIA—The Wireless Association®, formerly known as the Cellular Telecommunications & Internet Association, represents all sectors of the wireless communications industry.[1] Members of CTIA include service providers, manufacturers, wireless data and Internet companies, as well as other contributors to the wireless industry. CTIA frequently participates in regulatory and judicial proceedings and coordinates efforts to educate government agencies and the public about wireless industry issues. CTIA has regularly participated as *amicus curiae* in cases before this Court addressing arbitration issues, including, most recently, *Vaden* v. *Discover Bank*, 129 S. Ct. 1262 (2009); *Preston* v. *Ferrer*, 128 S. Ct. 978 (2008); and *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396 (2008).

Many members of CTIA have adopted as standard features of their business contracts provisions that require the parties to pursue disputes in arbitration rather than in courts of general jurisdiction. CTIA members use arbitration because—in its traditional, individual form—it is a quick, fair, inexpensive, and non-adversarial method of resolving dis-

[1] Pursuant to Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the clerk.

putes. Those advantages, however, would be forfeited if class-action procedures were superimposed on arbitration. In fact, in the experience of CTIA's members, class arbitration is a nightmarish procedure that combines class-action litigation's expense, delay, and enormous stakes with arbitration's exceptionally narrow standard of review. Unsurprisingly, there are precious few examples of arbitration agreements that expressly authorize arbitrators to conduct class-wide proceedings. Instead, class arbitration has come about effectively by accident. Specifically, in recent years some courts and arbitrators have concluded that contracts that are "silent" on the subject of class arbitration—as are the many agreements that failed to anticipate this recent judicial innovation—should be construed to permit class arbitration. Because CTIA members are parties to arbitration agreements that do not specifically prohibit class arbitration, CTIA has a strong interest in explaining why, under the Federal Arbitration Act, silence about this departure from traditional arbitration procedures may never be deemed to constitute consent.

INTRODUCTION AND SUMMARY OF ARGUMENT

CTIA concurs in petitioners' argument that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, precludes courts from imposing class-wide arbitration on parties that did not expressly agree to such a procedure. This brief provides additional context for understanding why the reasonable expectations of parties to such "silent" arbitration agreements do not include the possibility of class arbitration.

Arbitration has long been understood to be a simpler, faster, and cheaper method of resolving individual disputes between contractual parties than going to court. Until recently, class arbitration was more of an exercise in imagination than a real-world means of dispute resolution. But in recent years, class-action lawyers seeking to expand their turf to the arbitral forum have persuaded some courts and arbitrators that silence on the subject of class arbitration is the equivalent of consent to the arbitrator's authority to conduct such a proceeding. In fact, however, the available empirical evidence confirms that the opposite is the case—*i.e.*, that businesses recognize that class arbitration is a Frankenstein's monster to which the only reasonable response is running in the opposite direction as fast as possible.

Class arbitration offers none of the benefits of traditional arbitration—namely, dispute resolution that is swifter, simpler, less expensive, and less adversarial than litigation. At the same time, this hybrid procedure remains subject to the FAA, meaning that arbitrators' decisions on both class certification and the merits are reviewable only for bias, corruption, and the like—cold comfort when, as in class arbitration, the stakes are multiplied to bet-the-company levels. That extraordinarily deferential approach to arbitration makes sense in an individual proceeding because the speed and cost savings compared with litigation more than compensate for the absence of robust judicial review. But that trade-off makes no sense in a class arbitration. Class-arbitration proceedings are just as burdensome as class-action litigation—if not more so—and few businesses would be willing to put their fates in the hands of a single decisionmaker unconstrained by meaningful review.

Class arbitration also deprives the parties of the finality afforded by judicial class actions. Even if the business wins the arbitration or the parties reach a class-wide settlement, there is no guarantee that any of the absent class members would be bound. The major arbitration providers that have agreed in the last few years to administer class arbitrations have sought to duplicate the due process protections afforded to absent class members by courts. But especially when the arbitration agreement does not expressly authorize class arbitration, absent class members may understandably object that they did not agree to be subject to an arbitral award issued in their absence by an arbitrator in whose selection they had no input. And given courts' near-powerlessness to review arbitrators' decisions on such issues as class certification, the merits of a class-wide claim, and the amount of damages, the prospect of judicial oversight of class arbitrations is a mirage.

In sum, an agreement to arbitrate disputes that permits class arbitration presents businesses with a lose-lose proposition. It therefore defies common sense to suppose that rational parties to an arbitration agreement would have wanted to authorize class arbitration. The FAA instructs courts to give effect to the parties' agreements to arbitrate, not to impose additional procedures to which the parties did not agree and to which no rational potential defendant would agree.

ARGUMENT

Under the FAA, the mere fact that an arbitration agreement does not expressly bar class arbitration cannot justify interpreting the agreement as being

ambiguous on the subject, much less as reflecting consent to such a procedure. Although in theory parties may agree to class arbitration, any holding that silence on the subject may be deemed to be consent would deter defendants from invoking their contractual right to arbitrate whenever there is a risk that the claim against them could be converted into a class claim. That in turn would frustrate the federal policy favoring arbitration.

A. In Determining Whether A "Silent" Arbitration Agreement Permits Class Arbitration, Courts May Not Adopt Interpretive Rules That Would Frustrate The Federal Policy Favoring Arbitration.

This Court has recognized that "[t]he preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements" to arbitrate disputes. *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). Accordingly, the Court has directed lower courts to "'rigorously enforce' [arbitration] agreements according to their terms." *Volt Info. Scis., Inc.* v. *Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) (quoting *Byrd*, 470 U.S. at 221). That is so even when requiring arbitration would result in inefficiencies. Indeed, the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement" that applies to only some claims or some parties to a dispute. *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (emphasis in original). That is because "the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms, and ac-

cording to the intentions of the parties." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995) (internal quotation marks and citations omitted).

As this Court has explained, "[w]hen deciding whether the parties agreed to arbitrate a certain matter * * *, courts generally * * * should apply ordinary state-law principles that govern the formation of contracts." *Id.* at 944. But in interpreting an arbitration agreement governed by the FAA, "due regard must be given to the federal policy favoring arbitration." *Volt*, 489 U.S. at 476. Thus, for example, when "the problem at hand is the construction of the contract language itself," the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25; *see also, e.g.*, *First Options*, 514 U.S. at 944 (same); *Volt*, 489 U.S. at 476 (same). Nor may courts invoke some other "judicial policy concern" as a ground for declining to enforce an arbitration agreement altogether. *14 Penn Plaza LLC* v. *Pyett*, 129 S. Ct. 1456, 1472 (2009). Similarly, courts may not allow such external variables to "distort the process of contract interpretation." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985). For example, a court's "concern for statutorily protected classes provides no reason to color the lens through which the arbitration clause is read." *Id.* at 628.

This principle applies with special force when it is urged that state law requires refusal to enforce an arbitration provision as written. As this Court has reiterated time and again, the FAA's "'national policy favoring arbitration' * * * 'appl[ies] in state as well as federal courts' and 'foreclose[s] state legislative at-

tempts to undercut the enforceability of arbitration agreements." *Preston* v. *Ferrer*, 128 S. Ct. 978, 983 (2008) (quoting *Southland Corp.* v. *Keating*, 465 U.S. 1, 10, 16 (1984) (alterations by the Court); *see also Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 445-446 (2006); *Doctors' Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 684-685 (1996); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995); *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987). Thus, "[a] court may not * * *, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." *Perry*, 482 U.S. at 492 n.9. *See also Iberia Credit Bureau, Inc.* v. *Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004) ("Even when using doctrines of general applicability, state courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny.").

Under these principles, a court should first look to state law in determining whether an implied term should be inserted into the gap of a purportedly incomplete arbitration agreement. But the FAA would displace any interpretive rule that would lead to a result that is hostile to the federal policy favoring arbitration. For example, as Justice Breyer has observed, an arbitration agreement that does not specify the location of the arbitration hearing cannot be construed to require arbitration "at the bottom of a coal mine with no air." Tr. of Oral Argument, *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444 (2003) (No. 02-634), 2003 WL 1989562, at *34. To impose such an impossible condition on enforcement of an arbitration agreement would effectively nullify it.

Nor may courts accomplish the same forbidden goal indirectly by adopting interpretive rules that undermine the essence of the parties' arbitration agreement, thereby making arbitration substantially less attractive to the parties. For example, courts may not further a state policy favoring trial by jury by construing an arbitration agreement that is silent on the subject to require the arbitrator to convene a jury to resolve all factual issues in the arbitration: That would eviscerate one of the fundamental characteristics of arbitration. *Cf.* Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 410 (2004) ("[A] state law that invalidated all pre-dispute waivers of the right to jury trial * * * would make arbitration agreements wholly unenforceable in the state, because by definition arbitration clauses provide for an arbitrator, rather than a jury, to resolve the parties' dispute."). For similar reasons, an arbitration agreement that does not spell out the procedural rules that apply to an arbitration cannot—consistently with the FAA—be interpreted to require the arbitrator to apply every last jot and tittle of the Federal Rules of Evidence and Federal Rules of Civil Procedure. To construe silence to require the convening of a jury or the strict application of courtroom procedures would undermine the point of agreeing to arbitration—which is to resolve disputes more simply and cheaply than judicial litigation. Such interpretive rules thus would deter parties from invoking their arbitration rights whenever their agreements are silent on these issues.

The exact same logic applies to the issue here: whether silence as to class arbitration may be construed as tacit consent to it. As we next explain, class arbitration is a recent innovation that parties

to arbitration agreements almost never consciously choose because it offers none of the benefits of arbitration and cannot replicate some of the critical judicial safeguards that make it possible to entertain a class action consistent with the Due Process Clause. If silent arbitration agreements can be interpreted to permit class arbitration—whether by purportedly construing the agreement against the drafter or in furtherance of a state policy favoring class actions—defendants who have entered into such agreements will be deterred from enforcing them whenever the claims at issue are potentially subject to class-wide treatment. That result would be inimical to the federal policy favoring arbitration.

B. The History Of Class Arbitration Demonstrates That Parties To Arbitration Agreements Never Intended Their Silence On The Subject To Be Construed As Consent To This Radical New Hybrid.

The history of arbitration agreements over the past eight decades since the FAA was enacted confirms that silence on the subject of class arbitration cannot, consistent with the FAA, be interpreted as consent to this novel procedure.

Class arbitration is a new invention. For almost all of the 20th century, arbitration was understood to be an individualized proceeding. One academic reported in 2000 that, despite "an extensive effort" to locate attorneys who had participated in class arbitrations, her research "found just a handful," indicating that "very few arbitrations have been handled as class actions." Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 38-

41 & n.148 (2000). Indeed, it was not until 2003, in the wake of the plurality decision in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), that the major arbitration providers first set forth rules under which they would conduct class arbitrations. David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitrations and the Federal Arbitration Act's Legislative History*, 63 BUS. LAW. 55, 56 & n.1 (2007).

The available empirical evidence confirms that parties almost never affirmatively agree to permit class arbitration. A review of the class-arbitration docket of the American Arbitration Association—the largest arbitration provider in the Nation—reveals that, in the overwhelming majority of class arbitrations in which a Clause Construction Award is reported, the applicable arbitration provision was silent as to the availability of class arbitration. *See* AAA, Searchable Class Arbitration Docket, http://www.adr.org/sp.asp?id=25562 (last visited Sept. 3, 2009). A list of those class arbitrations is attached as an appendix to this brief.[2] Of the 111 reported Clause Construction Awards, only four—or about 3.6 percent—are known to have involved arbitration agreements that expressly authorized that procedure.[3] Stated another way, over 96 percent of AAA class arbitrations with reported Clause Construction Awards resulted from arbitration clauses that did not expressly permit class arbitration.

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[2] The list in the appendix is not a comprehensive list of all AAA class arbitrations because the AAA has not published the Clause Construction Awards in all cases.

[3] Three of those four awards appear to involve the same employer's arbitration provision.

Many arbitrators appear to have taken the wrong lesson from *Bazzle*. Rather than treating it as a simple direction to discern the contracting parties' intent, many arbitrators seem to believe that it puts a thumb on the scale in favor of class arbitration. Of the 81 reported AAA Clause Construction Awards in which the meaning of "silent" arbitration provisions was contested, arbitrators concluded that all but 3 of them permitted class arbitration. *See* Appendix.

Some arbitrators have gone to great lengths to interpret arbitration agreements as "silent" on the question of class arbitration in the first place. For example, one arbitrator deemed a lender's arbitration agreement to be "silent" even though the agreement stated that the customer "will not participate in any class action lawsuit in connection with any such dispute, claim, or controversy, either as a representative plaintiff or as a member of a putative class." *See* Partial Final Clause Construction Award, *Jones* v. *Genus Credit Mgmt. Corp.*, AAA Case No. 11 1 1 00295 05, http://www.adr.org/si.asp?id=3792 at 2 (Oct. 13, 2005).[4] Another arbitrator reached the same interpretation of an agreement that specified that "no arbitration * * * shall include, by consolida-

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[4] When the defendant moved to vacate the arbitrator's clause construction award, the district court held that the arbitrator's interpretation did not constitute "manifest disregard of the law," because the arbitration agreement's express prohibition of "'class action lawsuit[s]' * * * does not clearly encompass arbitration claims because lawsuit normally means a case before a court." *Genus Credit Mgmt. Corp.* v. *Jones*, 2006 WL 905936, at *3 (D. Md. Apr. 6, 2006). Because the arbitrator arguably had "applied the language of the parties' contract" rather than deliberately "ignore it in propounding his decision," the court concluded that the narrow standard of review of arbitral awards precluded it from vacating the clause construction award. *Id.*

'tion, joinder, or in any other manner, any person other than [claimant] and [respondent] and any other person in privity with or claiming through, in the right of or on behalf of [claimant] or [respondent] * * *." Preliminary Award on Hobby's Request to Allow Class Action (Clause Construction Award), *Hobby* v. *Snap-on Tools Co., LLC*, AAA Case No. 11 114 01884 04, http://www.adr.org/si.asp?id=3695 at 4 (June 8, 2005). *See also* Partial Final Clause Construction Award of Arbitrator, *Fortuna* v. *Snap-on Tools Co., LLC*, AAA Case No. 11 114 01818 04, http://www.adr.org/si.asp?id=3858 (Aug. 12, 2005) (examining same clause).

Given the novelty of class arbitration and the rarity of an agreement that affirmatively permits it, a claim that a silent arbitration agreement should be interpreted to authorize class arbitration should be viewed with great skepticism—and for good reason. As we explain in the next two sections, class arbitration is a worst-of-both-worlds hybrid of arbitration and litigation. On one hand, it eliminates all of the benefits of traditional, individual arbitration—speed, simplicity, cost savings, and reduced adversariality. On the other hand, it does not allow for comprehensive judicial review of class certification decisions, evidentiary rulings, sufficiency of the evidence, or the amount of damages in what easily could morph into a multi-billion-dollar case. Moreover, it does not ensure defendants finality because absent class members can be expected to contend that they were not afforded the due process protections necessary to make a class-wide award binding on them.

C. The Traditional Benefits Of Arbitration Are Lost In Class Arbitration.

Parties enter into arbitration agreements because, as Congress has repeatedly found, arbitration avoids the "delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation." Y2K Act of 1999, PUB. L. NO. 106-37 § 2(a)(3)(B)(iv), 106 Stat. 185, 186; *see also* H.R. Rep. No. 542, 97th Cong., 2d Sess. 13 (1982) (arbitration is "cheaper and faster than litigation," has "simpler procedural and evidentiary rules," "minimizes hostility," and is "more flexible in regard to scheduling"). This Court, too, has recognized the "simplicity, informality, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628.

For these reasons, businesses that use standard form contracts with their customers and employees often include an arbitration provision among the terms. The customers and employees benefit from this practice. As this Court has recognized, "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce*, 513 U.S. at 280. Without arbitration, "the typical consumer who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set) without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery." *Id.* at 281. Moreover, to the extent that arbitration permits a business to resolve disputes more cheaply, those "cost-saving benefits * * * in competition are passed along to customers." *Boomer* v. *AT&T Corp.*, 309 F.3d 404, 419 (7th Cir. 2002) (internal quotation marks omitted); *see also* Stephen J.

Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254-255 (2006) (arbitration "lower[s] [businesses'] dispute-resolution costs," and this "benefit to business is also a benefit to consumers" because "whatever lowers costs to businesses tends over time to lower prices to consumers").

When class-action procedures are superimposed upon arbitration, however, the expedition, informality, and cost-savings of traditional, individual arbitration are lost. For example, the AAA's rules for class arbitrations largely parrot the Federal Rules of Civil Procedure. *See generally* AAA, Supplementary Rules for Class Arbitrations ("AAA Class Arbitration Rules"), *at* http://www.adr.org/sp.asp?id=21936 (effective Oct. 8, 2003). Hence, a class arbitration entails (i) substantial discovery for purposes of determining such prerequisites as typicality and adequacy of the class representatives and commonality of the claims across class members; (ii) plenary briefing of the class certification issue; (iii) an evidentiary hearing; (iv) a written ruling; and (v) a motion to vacate the class determination award by whichever party lost before the arbitrator. If, after all of that, a class is certified, the AAA rules require full and adequate notice to class members and an opportunity to opt out.[5] Discovery commensurate with the now-increased stakes of the arbitration would then begin and likely continue for years. Should the defendant yield to the hydraulic pressure to settle that class

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[5] That's not to say that a court necessarily will deem any such notice to be adequate to defeat a subsequent collateral attack by an absent class member. *See* pages 18-21, *infra*.

certification creates (*see In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-1299 (7th Cir. 1995)), efforts to satisfy the due process rights of absent class members would necessitate another round of notice followed by a fairness hearing, complete with extensive briefing by both sides and by any objectors. And if the defendant chooses not to settle, there would need to be a class-wide arbitration on the merits of the underlying claim. As one commentator has observed, class arbitration "brings the burdens of litigation into the arbitral forum" and "lessens the distinction between the two processes." Jonathan R. Bunch, Note, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration*, 2004 J. DISP. RESOL. 259, 272.

In short, class arbitration is the quintessential example of alternative dispute resolution "mutat[ing] into a private judicial system that looks and costs like the litigation it's supposed to prevent." Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, HARV. BUS. REV. 120, 120 (May 1994).

D. Class Arbitration Lacks The Safeguards Of Class-Action Litigation.

Engrafting class-action procedures upon arbitration does more than merely forfeit the traditional benefits of arbitration. At the same time, it fails to provide many of the key protections offered to defendants litigating a class action in court.

1. To begin with, unlike in court, where appellate review of class-certification and merits determinations is robust, the standard for vacating an arbitrator's decision on such issues is "among the nar-

rowest known to law." *Dominion Video Satellite, Inc.* v. *Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005) (internal quotation marks omitted). Although the FAA authorizes courts to vacate arbitral awards for such reasons as fraud or bias (9 U.S.C. § 10), parties may not agree by contract to expand those very limited grounds for review. *Hall St. Assocs., L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396, 1403-1404 (2008) (citing 9 U.S.C. § 10). In *Hall Street*, this Court noted that, under its prior precedent, the substance of an arbitral award may be reviewed for "manifest disregard of law," and continued to "tak[e that] language as we found it, without embellishment." *Id.* at 1404. But most courts have construed the "manifest disregard" standard to be "a 'severely limited' doctrine." *Wallace* v. *Buttar*, 378 F.3d 182, 189 (2d Cir. 2004) (quoting *Gov't of India* v. *Cargill Inc.*, 867 F.2d 130, 133 (2d Cir. 1989)). Accordingly, an arbitrator's decisions regarding class certification; the scope of any class; the admissibility of expert testimony or other important evidence; whether or not the claim was proven; and the amount of damages can be disturbed by a court only if so egregiously wrong as to constitute a manifest disregard of the law. And, indeed, many courts have mistakenly extended that principle of narrow review to apply even to decisions that go to the heart of the arbitral bargain and what powers—such as transforming individual arbitration into class arbitration—the parties intended to confer on private decision-makers through their agreement. *See, e.g.*, *Veliz* v. *Cintas Corp.*, 2009 WL 1766691 (N.D. Cal. June 22, 2009) (confirming award construing agreement as permitting class arbitration); *Dealer Computer Servs., Inc.* v. *Randall Ford, Inc.*, 2009 WL 277557 (S.D. Tex. Feb. 4, 2009) (same); *JSC Surgutneftegaz* v. *Presi-*

dent & Fellows of Harvard Coll., 2007 WL 3019234 (S.D.N.Y. Oct. 11, 2007) (same).

For example, the Fair Labor Standards Act ("FSLA") requires that classes be limited to individuals who affirmatively have opted in, as opposed to the typical Rule 23 procedure under which individuals are members of the class unless they opt out. Nevertheless, in a case in which the arbitration provision was silent on the subject of class arbitration, an arbitrator first found class arbitration to be permissible and then ruled that all employees within the scope of the class definition who did not opt out would be included in the class. The district court and court of appeals refused to disturb either ruling. *See Long John Silver's Rests., Inc.* v. *Cole*, 514 F.3d 345 (4th Cir.), *cert. denied*, 129 S. Ct. 58 (2008). In fact, to our knowledge, no court has vacated an arbitrator's class-certification award. *See* Clancy & Stein, 63 BUS. LAW at 70 n.80 (reporting that "through September 28, 2007, no court has reversed an arbitrator's decision to certify a class"); *see also, e.g.*, *Dealer Computer Servs., Inc.* v. *Fox Valley Ford*, 310 F. App'x 749 (6th Cir. 2009) (rejecting appeal of award construing arbitration agreement as permitting class arbitration); *Veliz*, 2009 WL 1766691 (confirming award construing agreement as permitting class arbitration); *Randall Ford*, 2009 WL 277557 (same); *JSC Surgutneftegaz*, 2007 WL 3019234 (same). That record stands in stark contrast to that of the federal courts of appeals, which have exercised their power under Federal Rule of Civil Procedure

23(f) to reverse class-certification orders with some frequency.[6]

Many businesses are willing to forgo meaningful judicial review in an individual arbitration because of their desire for a less costly and less adversarial method of resolving disputes. The risk calculus changes dramatically, however, in the context of class arbitration. The stakes of a class arbitration are exponentially higher than those of an individual arbitration. No business would rationally expose itself to the possibility of ruinous liability without the availability of robust judicial review.

2. Beyond the lack of effective judicial review, defendants in a class arbitration also are deprived of the certainty that, if they win or settle the case, all (or substantially all) of the absent class members would be bound by the result. That is because the *res judicata* effect of class arbitration is unsettled at best.

Arbitration "is a matter of consent, not coercion." *Volt*, 489 U.S. at 479. Particularly when an arbitration agreement does not expressly authorize class arbitration, the absent class members would have a powerful argument that they did not agree to be bound by an award resulting from an arbitration

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[6] A study of Rule 23(f) petitions between December 1, 1998 and October 30, 2006 found that courts granted interlocutory review 36 percent of the time. Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 778 PLI/LIT 117, 128 (2008). Another study of Rule 23(f) petitions granted between 1998 and December 2007 found that courts of appeals reversed the class-certification order 52.5 percent of the time. Richard D. Freer, *Interlocutory Review of Class Certification Decisions: A Preliminary Study of Federal and State Experience*, 35 W. ST. U. L. REV. 13, 19 (2007).

proceeding in which they did not participate. As this Court has explained, class actions "implicate the due process principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (internal quotation marks omitted).

Judicial class actions are able to comport with due process because the court ensures that the named plaintiff serves as a fiduciary for the members of the class whom he or she represents. True, the major arbitration providers' rules for class arbitrations purport to require the arbitrator to inquire into the adequacy of the claimant as a representative of the class, to probe the eventual settlement for fairness to absent class members, and to ensure the efficacy of notice to the class. *See, e.g.*, AAA Class Arbitration Rules 4-8. But those procedures do not hold the same promise in class arbitration as they do in a judicial class action. Unlike in court, in a class arbitration, the parties select the arbitrator. That distinction makes no difference when arbitration involves a small number of parties—as it traditionally always has—because, under the rules of leading arbitration providers, each party may veto the selection of an undesirable arbitrator, and arbitrators are subject to strict requirements to disclose potential conflicts of interest to the parties.[7] But this distinction may make a difference in a class arbitration because the absent class members have no say in the selec-

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[7] *See, e.g.*, AAA, Commercial Arbitration Rules and Mediation Procedures, Rules 11 and 16, *at* http://www.adr.org/sp.asp?id=22440 (effective June 1, 2009).

tion of the arbitrator. As one commentator has observed, "it is difficult to see how such an arbitrator would play the role of the court in checking possible self-dealing." Sternlight, 42 WM. & MARY L. REV. at 113.

Criticism of judicial class actions for the treatment of absent class members is widespread. In the consumer context, for example, class members often are consigned to receiving only coupons or pennies on the dollar for their claims, while class counsel recovers millions (and sometimes far more than the class itself).[8] In fact, Congress has found that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed." Class Action Fairness Act of 2005, PUB. L. NO. 109-2 § 2(a)(3), 119

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[8] *See, e.g.*, Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71 (2007); James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 GEO. J. LEGAL ETHICS 1443 (2006); John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903; Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 L. & CONTEMP. PROBS. 167 (1997); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996). This criticism is well founded. For example, in one recent class-action settlement, class counsel received $1,050,000 in cash and $50,000 in coupons, while the entire nationwide class received only $2,402 in cash and coupons. *See Moody* v. *Sears, Roebuck & Co.*, 2007 WL 2582193 (N.C. Super. Ct. 2007), *rev'd*, 664 S.E.2d 569, 582 (N.C. Ct. App. 2008) (reinstating settlement because although "we share the trial court's serious concerns regarding the final accounting in the * * * settlement, we are constrained to hold that the trial court erred by refusing to accord full faith and credit to the" Illinois judgment approving it).

Stat 4. These criticisms apply with even greater force to class arbitration. Given the lack of effective judicial review of class arbitration, any class settlement that inadequately addresses the rights of absent class members, or any defects in the notice provided to the class, may escape correction.

Whether or not it is theoretically possible to overcome these concerns and for a defendant to obtain true finality after a class arbitration, the risk that a court or arbitrator will refuse to give a class-wide arbitral award or settlement *res judicata* effect would remain real. No matter how conscientious the arbitrator may be, a defendant can legitimately worry that a court will be sympathetic to an absent class member's entreaty to be given a chance to control his or her own destiny. After all, the court is unlikely to have the same comfort level with the decision of an arbitrator than with either its own decision or that of a colleague on the bench. And in this instance, the court probably would not be bound by the FAA's narrow standard of review given that the party before the court was not party to the arbitration.

* * * * *

In sum, given the risks entailed in class arbitration and the absence of any offsetting benefits, no reasonable defendant would willingly subject itself to this Frankenstein's monster. Instead, absent assurance that silence will not be taken to mean acquiescence, defendants whose arbitration agreements don't expressly rule out class arbitration will simply stop enforcing those agreements whenever there is any risk that the plaintiff will seek class-wide treatment. Nothing could more squarely conflict with the purposes of the FAA.

CONCLUSION

The judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX

Reported Clause Construction Awards from the American Arbitration Association's Class Arbitration Docket (as of September 1, 2009)

Case Name	AAA Case No.	Date	Clause Construction Award
Adame v. *Fleetwood Enterps., Inc.*	11 181 01292 07	3/11/08	Silent arbitration provision construed to permit class arbitration.
Addleman v. *The Ryland Group, Inc.*	11 181 01524 05	9/15/05	Silent arbitration provision construed to permit class arbitration.
Alexander v. *GMRI, Inc.*	11 160 02018 05	4/24/06	Silent arbitration provision construed to permit class arbitration.
Ali v. *Morton's of Chicago/ Sacramento, Inc.*	11 160 02015 05	3/22/06	Silent arbitration provision construed to permit class arbitration.
Allen v. *Sports & Fitness Clubs of Am., Inc.*	11 160 03041 04	4/13/05	Arbitration provision that prohibited class arbitration construed to permit it.
Anderson v. *Check 'N Go of Cal. Inc.*	11 160 03021 04	6/20/05	Silent arbitration provision construed to permit class arbitration.
Armstrong v. *Ameriquest Mortgage Co.*	11 160 Y 01652 06	5/23/07	Silent arbitration provision construed to permit class arbitration.
Associated Pathology Consultants, S.C. v. *United Healthcare of Ill., Inc.*	11 195 00971 06	12/18/06	Silent arbitration provision construed to permit class arbitration.
Awe v. *I & M Rail Link, LLC*	11 160 00026 05	5/24/05	Silent arbitration provision construed to permit class arbitration.

Case Name	AAA Case No.	Date	Clause Construction Award
Bagpeddler.com v. *U.S. Bancorp & Nova Info. Sys.*	11 181 00322 04 (consolidated with *Execu/Tech Sys., Inc. v. U.S. Bancorp*, No. 11 181 00326 04)	9/2/04	Silent arbitration provision construed to permit class arbitration.
Bandler v. *Charter One Bank, N.A.*	11 148 02801 04	9/3/06	Silent arbitration provision construed to permit class arbitration.
Barmak v. *Pasquinelli-Heron Bay, LLC*	11 115 02642 07	3/20/08	Parties stipulated that silent arbitration provision permitted class arbitration.
Barton v. *Cottage Homesteads of Am., Inc.*	11 115 02967 04	5/11/05	Silent arbitration provision construed to permit class arbitration.
Beazury v. *Arbor Homes, LLC*	11 148 02161 04	1/31/05	Silent arbitration provision construed to permit class arbitration.
Bennett v. *TUV SUD Am., Inc.*	11 145 001543 08	4/17/09	Silent arbitration provision construed to permit class arbitration.
Brown v. *Cellco P'ship*	11 494 01274 05	9/16/05	Respondent did not contest clause construction where arbitration provision was silent.
Bryant v. *Joel Antunes, LLC*	11 160 01783 05	4/21/06	Silent arbitration provision construed to permit class arbitration.
Budner v. *Ralph Oats*	11 181 00828 04	12/20/04	Agreement to arbitrate claims up to $100,000 that was silent as to class arbitration construed to permit it. Because the damages sought exceeded $100,000, the arbitrator held that class arbitration in this particular case was barred.

Case Name	AAA Case No.	Date	Clause Construction Award
Cable Connection, Inc. v. *DirecTV, Inc.*	11 145 00752 04	2/8/05	Silent arbitration provision construed to permit class arbitration.
Champion Ford Lincoln Mercury, Inc. v. *Dealer Computer Servs., Inc.*	11 117 01935 06	6/6/07	Silent arbitration provision construed to permit class arbitration.
Chavez v. *3P Delivery, Inc.*	11 145 Y 1839 07	6/12/09	Parties stipulated that a silent arbitration provision permitted class arbitration, and respondent waived its right to seek enforcement of a prohibition of class actions that appeared in another arbitration provision.
Cole v. *Long John Silver's Rests., Inc.*	11 160 00194 04	6/15/04	Silent arbitration provision construed to permit class arbitration.
Cook v. *Rent-A-Center, Inc.*	11 160 01815 04	9/19/05	Arbitrator ruled that respondent was estopped from denying that silent arbitration provision permitted class arbitration.
Cotton v. *Rent-A-Center, Inc.*	11 160 01819 04	8/12/05	Court compelled class arbitration, and arbitrator independently confirmed that silent arbitration provision permitted class arbitration.
Crawford v. *Labor Ready Nw., Inc.*	11 160 02264 06	6/20/07	Arbitrator construed silent arbitration provision and arbitration provision that prohibited class arbitration to permit class arbitration.

Case Name	AAA Case No.	Date	Clause Construction Award
Cummings v. *AT&T Corp.*	11 181 02586 04	3/3/06	Arbitration provision that prohibited class arbitration was construed not to permit class arbitration. Arbitrator declined to consider claimant's argument that the class arbitration waiver was unconscionable, because a court had already rejected it.
Dealer Computer Servs., Inc. v. *Randall Ford, Inc.*	11 117 Y 002788 06	6/3/08	Silent arbitration provision construed to permit class arbitration.
Depianti v. *Bradley Mktg. Enterps., Inc.*	11 114 00838 07	8/1/08	Silent arbitration provision construed to permit class arbitration.
Dub Herring Ford, Inc. v. *Dealer Computer Servs., Inc.*	11 181 01119 06	11/21/06	Silent arbitration provision construed to permit class arbitration.
Esposito v. *Morton's of Chicago/ Boston, Inc.*	11 160 02864 03	9/20/04	Arbitration provision that expressly permitted class arbitration construed to permit it.
Fannan v. *Technisource, Inc.*	11 160 01881 06	2/25/07	Silent arbitration provision construed to permit class arbitration.
Flaxman v. *Terminix, Inc.*	11 434 00701 07	1/14/08	Silent arbitration provision construed to permit class arbitration.
Flores v. *Arakelian Enterps., Inc.*	11 160 02637 05	11/14/07	Parties stipulated that, pursuant to the arbitrator's award, silent arbitration provision permitted class arbitration.
Fortuna v. *Snap-on Tools Co., LLC*	11 114 01818 04	8/12/05	Arbitration provision that prohibited consolidation and joinder construed to permit class arbitration.

Case Name	AAA Case No.	Date	Clause Construction Award
Fox Valley Ford v. *Dealer Computer Servs., Inc.*	11 117 01929 06	11/9/07	Silent arbitration provision construed to permit class arbitration, based on both the doctrine of collateral estoppel and the panel's independent determination.
Francis v. *United El Segundo, Inc.*	11 160 00267 07	4/30/07	Arbitrator treated as law of the case a court ruling that the class action allegations should be resolved in arbitration.
Garrett v. *Rollins, Inc.*	11 181 01663 04	3/23/05	Silent arbitration provision construed to permit class arbitration.
Garza v. *Palm Harbor Homes, Inc.*	11 181 000972 07	6/27/08	Silent arbitration provision construed to permit class arbitration.
Goldstein v. *Ibase Consulting of Fairfield Cty., LLC*	11 160 02760 03	3/28/04	Silent arbitration provision construed to permit class arbitration.
Grayson v. *Rent-A-Center, Inc.*	11 160 01823 04	8/8/05	Silent arbitration provision construed to permit class arbitration.
Groves v. *Hemet Mf'g Co., Inc.*	11 160 00194 05	11/8/05	Silent arbitration provision construed to permit class arbitration.
Hamilton v. *Rent-A-Center, Inc.*	11 160 01825 04	10/21/05	Silent arbitration provision construed to permit class arbitration.
Haro v. *NCR Corp.*	11 160 1962 05	3/6/06	Parties stipulated that silent arbitration provision permitted class arbitration.
Harris v. *TeleTech Holdings, Inc.*	11 160 02701 04	12/16/05	Silent arbitration provision and arbitration provision that expressly allowed class arbitration construed to permit class arbitration.
Hausner v. *United Healthcare of Tex., Inc.*	11 193 Y 00447 07	10/19/07	Silent arbitration provision construed to permit class arbitration.

Case Name	AAA Case No.	Date	Clause Construction Award
Hayes v. *M.S. Carriers, Inc.*	11 118 02907 04	6/15/05	Silent arbitration provision construed to permit class arbitration.
Hearthside Rest., Inc. v. *Qwest Dex, Inc.*	11 147 00357 04	9/2/04	Silent arbitration provision construed to permit class arbitration.
Hernandez v. *TeleTech Gov't Sol'ns, LLC*	11 160 01892 06	6/7/07	Silent arbitration provision construed to permit class arbitration.
Hightower v. *United Healthcare of La., Inc.*	11 193 02565 06	5/6/09	Silent arbitration provision construed to prohibit class arbitration.
Hill v. *iMergent, Inc.*	11 434 00318 08	2/23/09	Silent arbitration provision construed to permit class arbitration.
Hlas v. *Menard, Inc.*	11 160 00131 07	7/25/07	Silent arbitration provision construed to permit class arbitration.
Hobby v. *Snap-on Tools Co., LLC*	11 114 01884 04	6/8/05	Arbitration provision that prohibited consolidation and joinder construed to permit class arbitration.
Hoffman v. *Arthur Andersen LLP*	11 180 01410 05	3/23/06	Silent arbitration provision construed to permit class arbitration.
Holland v. *ECPI Coll. of Tech.*	11 434 001716 08	11/12/08	Parties stipulated that class waiver should be severed from arbitration provision and that remaining provision permitted class arbitration.
Jock v. *Sterling Jewelers, Inc.*	11 160 00655 08	6/1/09	Silent arbitration provision construed to permit class arbitration.
Johnson v. *Morton's Rest. Group, Inc.*	11 160 01513 05	5/22/06	Arbitration provision that expressly permitted class arbitration construed to permit it.
Jones v. *Genus Credit Mgmt. Corp.*	11 181 00295 05	10/13/05	Arbitration agreement that prohibited "class action lawsuit[s]" construed to permit class arbitration.

Case Name	AAA Case No.	Date	Clause Construction Award
Jost v. *Sizzler USA Rests., Inc.*	11 160 01721 05	10/25/06	Silent arbitration provision construed to permit class arbitration.
Kaplan v. *Citibank, N.A.*	11 148 1007 07	6/4/08	Class arbitration permitted pursuant to court order severing class waiver in arbitration provision.
Kinkel v. *Cingular Wireless, LLC*	11 494 02 646 06	10/12/07	Court held, and arbitrator independently determined, that class waiver was unconscionable and that remaining arbitration provision should be construed to permit class arbitration.
Kirsh v. *The Finova Group, Inc.*	11 148 Y 01381 07	9/29/08	Silent arbitration provision construed to permit class arbitration.
Krastel v. *TES Franchising, LLC*	11 114 00320 05	7/7/06	Silent arbitration provision construed to permit class arbitration.
La. Health Serv. Indemnity Co. v. *DVA Renal Healthcare, Inc.*	11 193 02297 06	10/5/07	Arbitration provision that prohibited joinder construed to permit class arbitration.
Le v. *Toshiba Am. Info. Sys., Inc.*	11 160 02033 04	3/7/05	Parties stipulated that arbitration provision permitted class arbitration. The docket does not disclose whether the arbitration provision was silent or not.
Levitt v. *Lipper Holding, LLC*	11 168 00663 04	5/23/05	Silent arbitration provision construed to permit class arbitration.
Lichter v. *Alarm One, Inc.*	11 180 00240 08	8/13/08	Silent arbitration provision construed to permit class arbitration.
Lundy v. *Blimpie Int'l, Inc.*	13 114 03098 02	4/26/07	Silent arbitration provision construed to permit class arbitration.
Maslo v. *Oak Pointe Country Club, Inc.*	11 181 02243 06	8/1/07	Silent arbitration provision construed to permit class arbitration.

Case Name	AAA Case No.	Date	Clause Construction Award
McCague v. *Corinthian Colls., Inc.*	11 434 01278 08	5/11/09	Silent arbitration provision construed to permit class arbitration.
McFann v. *Volt Telecommc'ns Group, Inc.*	11 160 02592 07	4/15/08	Parties agreed that the arbitration provision did not preclude or prevent class arbitration and consented to forego the clause construction phase.
McGraw v. *Morton's Rest. Group, Inc.*	11 160 02171 06	7/3/07	Arbitration provision that expressly permitted class arbitration construed to permit class arbitration.
Medina v. *GMRI, Inc.*	11 160 02409 04	7/20/05	Silent arbitration provision construed to permit class arbitration.
Milstein v. *Protection One Alarm Servs., Inc.*	11 110 00270 04	10/11/04	Silent arbitration provision construed to permit class arbitration.
Molfetas v. *Stainsafe, Inc.*	11 181 00300 06	5/25/06	Parties stipulated that silent arbitration provision permitted class arbitration.
Morgan v. *Cintas Corp.*	11 160 00018 06 (consolidated with *Salcedo v. Cintas Corp.*, No. 11 160 01119 05)	8/16/06	Silent arbitration provision construed to permit class arbitration.
Morton v. *Championcomm.net of Tuscaloosa, Inc.*	11 199 00704 07	12/26/07	Silent arbitration provision construed to permit class arbitration.
Murdock v. *Thomas*	11 148 Y 01805 07	10/16/08	Respondent did not contest clause construction where arbitration provision was silent.

Case Name	AAA Case No.	Date	Clause Construction Award
Nasee v. *Global Horizons Manpower, Inc.*	11 160 00167 07	9/26/07	Parties stipulated that silent arbitration provision permitted class arbitration.
Nichols v. *Fanfare Media Works, Inc.*	11 160 Y 01780 06	6/14/07	Silent arbitration provision construed to permit class arbitration.
Olson v. *Rent-A-Center, Inc.*	11 160 01831 04	10/21/05	Arbitrator ruled that respondent was estopped from denying that silent arbitration provision permitted class arbitration.
Orea v. *Tavistock Rests. LLC*	11 160 01982 06	3/2/07	Silent arbitration provision construed to permit class arbitration.
Owens v. *Auto. Protection Corp.*	30 459 00642 05 (consolidated with *Price v. Auto. Protection Corp.*, No. 11 188 01140 05)	11/23/05	Parties agreed to waive the clause construction phase where arbitration provision was silent.
Parham v. *Am. Bankers Ins. Co. of Fla.*	11 195 00157 07	7/30/07	Silent arbitration provision construed to permit class arbitration.
Partners Two Inc. v. *Adecco N. Am., LLC*	11 114 03042 04	4/17/05	Respondent did not object to having the matter proceed as a class arbitration. However, respondent did not concede that the arbitration provision allowed class arbitration, and the arbitrator ruled that respondent's lack of objection would not affect the construction of the arbitration provision in future proceedings. The docket does not disclose whether the arbitration provision was silent.

Case Name	AAA Case No.	Date	Clause Construction Award
Passow v. *The Smith & Wollensky Rest. Group, Inc.*	11 160 00357 08	7/2/08	Silent arbitration provision construed to permit class arbitration.
Petsch v. *Orkin Exterminating Co.*	11 181 02541 04	8/31/05	Silent arbitration provision construed to permit class arbitration.
Pitcher v. *All Nations Group*	70 460 00427 06	10/10/07	Notwithstanding the agreement of the parties, the arbitrator independently determined that silent arbitration provision permitted class arbitration.
President and Fellows of Harvard Coll. v. *JSC Surgutneftegaz*	11 168 T 01654 04	8/1/07	Arbitration provision that expressly permits claims involving more than two parties, but does not mention class arbitration, construed to permit class arbitration.
Rhodes Colleges, Inc. v. *Satz*	11 181 02217 04	6/23/05	Silent arbitration provision construed to permit class arbitration.
Rich v. *Rent-A-Center, Inc.*	11 160 01833 04	8/18/05	Silent arbitration provision construed to not permit class arbitration.
Sanchez v. *Corinthian Coll., Inc.*	11 181 00236 5	11/15/05	Arbitration provision that prohibited class arbitration and silent arbitration provision were construed to permit class arbitration.
Scher v. *Oxford Health Plans, Inc.*	11 193 00548 05	3/7/06	Silent arbitration provision construed to permit class arbitration.
Se. Ga. Regional Med. Ctr., Inc. v. *Humana Military Healthcare Servs., Inc.*	11 193 00446 09	8/19/09	Parties stipulated that matter could be heard as a class arbitration, where arbitration provision was silent.

Case Name	AAA Case No.	Date	Clause Construction Award
Sidhu v. *GMRI, Inc.*	11 160 02273 04 (consolidated with *Mitchell v. GMRI, Inc.*, No. 11 160 02939 03)	6/10/05	Silent arbitration provision construed to permit class arbitration.
Silver v. *Westin Realty Corp.*	11 180 Y 01333 05	10/26/05	Parties stipulated that silent arbitration provision permitted class arbitration.
Smith v. *TeleTech Holdings, Inc.*	11 160 02726 04	4/12/05	Silent arbitration provision construed to permit class arbitration.
Stokes v. *AWSM Tech., LLC*	11 147 02374 06	6/22/07	Silent arbitration provision construed to permit class arbitration.
Sutter v. *United HealthCare Ins. Co.*	11 195 02075 06	11/9/07	Silent arbitration provision construed not to permit class arbitration.
Sutter v. *Oxford Health Plans, Inc.*	18 193 20593 02	9/23/03	Silent arbitration provision construed to permit class arbitration.
Tarek, LLC v. *Kincade*	11 Y 114 00578 04	7/30/04	Parties stipulated that silent arbitration provision permitted class arbitration.
Terrapin Express, Inc. v. *Airborne Express, Inc.*	11 199 015326 05	5/9/06	Silent arbitration provision construed to permit class arbitration.
Thomas v. *S. Commc'ns Servs., Inc.*	11 494 01518 08	4/2/09	Silent arbitration provision construed to permit class arbitration.
Tomeldon Co., Inc. v. *Medco Health Sol'ns, Inc.*	11 193 00546 06	11/22/06	Silent arbitration provision construed to permit class arbitration.
Travis v. *Rhodes Colleges, Inc.*	11 199 01827 06	6/26/07	Silent arbitration provision construed to permit class arbitration.

Case Name	AAA Case No.	Date	Clause Construction Award
Veliz v. *Cintas Corp.*	11 160 01323 04	12/11/08	Silent arbitration provision construed to permit class arbitration.
Walters v. *Palm Harbor Homes, Inc.*	11 421 002782 06	1/17/08	Silent arbitration provision construed to permit class arbitration.
Warrior Transp. v. *FFE Transp. Servs. Inc.*	11 118 00365 05	8/18/05	Silent arbitration provision construed to permit class arbitration.
Weller v. *Sprint Commc'ns, L.P.*	11 181 00070 06	8/22/06	Silent arbitration provision construed to permit class arbitration.
Wolf v. *Lakewood Homes, Inc.*	11 181 Y 01244 06	9/29/06	Respondents waived clause-construction phase for silent arbitration provision.
XM Satellite Radio Inc. v. *Enderlin*	11 181 00989 06	8/13/08	Silent arbitration provision construed to permit class arbitration.
Zacharias v. *Cypress Commc'ns, Inc.*	11 181 00004 06	11/27/06	Silent arbitration provision construed to permit class arbitration.

AMICUS CURIAE BRIEF

No. 08-1198

In The
Supreme Court of the United States

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL US, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF DUB HERRING FORD LINCOLN-MERCURY, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

Dub Herring Ford Lincoln Mercury, Inc. is part of a group of one hundred and six (106) automobile dealers from across the United States now participating in class arbitrations referenced in briefs currently before this Court and is part of one potential class of two thousand four hundred (2,400) auto dealers and another potential class of four hundred and fifty (450) dealers. American automobile dealers have knowledge of or experience with arbitration, which is why they pursued and obtained passage of special 2002 legislation by Congress extricating them from FAA arbitration with auto manufacturers, unless the arbitration is agreed after any disputes arise. See Motor Vehicle Suits Against Manufacturers Act, 15 U.S.C. Section 1226 (a)(2) (2002). They are broadly representative of American small businesses routinely required to participate in arbitrations and have experience with both class arbitration and the exorbitant expenses of individual American Arbitration Association ("AAA") arbitrations. Unlike the $ 50,000.00 median cost of a domestic arbitration documented by the recently released 6th Annual Litigation Trends Survey Report from Fulbright & Jaworski, their experience has been that the cost of an

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[1] Pursuant to Rule 37.6, no counsel for any party to these proceedings authored this brief, in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person, aside from the *amicus curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Petitioners and Respondent have submitted letters reflecting blanket consent to the filing of *amicus* briefs and such letters have been filed with the Clerk.

individual arbitration often exceeds $100,600.00 in arbitrators' fees and AAA administrative fees. See Fulbright and Jaworski, L.L.P, *Fulbright's 6th Annual Litigation Trends Survey* (2009), http://www.fulbright.com/litigationtrends06; see also *Dealer Computer Servs., Inc. v. Hammonasset Ford Lincoln-Mercury, Inc.*, Civil Action H-08-1865, 2008 U.S. Dist. LEXIS 103683 (S.D. Tex. Dec. 22, 2008); *Kemp Ford, Inc. v. Dealer Computer Servs., Inc.*, Civil Action No. 4:09-cv-01315 (S.D. Tex., May 25, 2009). The concrete threat of being forced to pay the AAA $120,000,000 to arbitrate the same issue 2,400 times before 7,200 arbitrators and another $45,300,000 to arbitrate a different set of common issues 450 times before another 1,350 arbitrators, demonstrates the astronomically excessive cost and inefficiency of individual AAA arbitrations. Worse, the burden of those expenses is in addition to the risks posed by 8,550 arbitrators issuing 2,850 potentially inconsistent awards. These superfluous risks have sensitized auto dealers to the critical importance of being heard on arbitration issues in this Court as well as in Congress. Preserving access to class arbitration is essential for all small businesses to be able to effectively vindicate their rights.

INTRODUCTION AND SUMMARY

Parties agree to use arbitration because it can have great utility in resolving disputes and is especially effective in facilitating international commerce. The arbitration clauses used in international and maritime transactions are negotiated between the most sophisticated and economically equal parties in the commercial world. The parties to these agreements most nearly approximate the theoretical contract ideal

of the coldly calculating corporate party knowledgeable of its interests, able to effectively analyze the risk - benefit ratio of including or excluding any particular clause in contracts it may choose to agree to and capable of maximizing value by aggressively asserting those interests. No parties to any other type of arbitration agreement have a more comprehensive capability of asserting their interests in a contract. If they choose not do so, they should not be rescued by the courts for not exercising due diligence in the drafting of their arbitration clauses. They certainly should not be saved in any manner that adversely affects arbitration in general such as by limiting the authority of arbitrators to employ class arbitration procedures. The classic policy rationale for "filling the gap" with efficient contract provisions the parties could have expressly adopted, such as recognizing the availability of class arbitration procedures, is "reasonable in the circumstances" and consistent with the policies articulated in RESTATEMENT (SECOND) OF CONTRACTS §204 (1981). Any purported adverse effects on international commerce are unfounded as the parties to those contracts can craft their clauses as they choose and presumably the potential victims of any antitrust conspiracies will also seek to obtain the benefits of class arbitration. The adoption of class arbitration procedures by arbitrators delegated to determine the parties' disputes is within their authority and complies with the economic efficiencies and benefits parties expect when agreeing to arbitrate any disputes.

The powers and options available to parties to international and maritime contracts stand in stark contrast to the position of domestic parties typically subject to arbitration provisions which have been

imposed on the economically weaker parties, such as small businesses. Whether arbitration is used in domestic or international contracts, it is typically agreed with the expectation of achieving greater cost effectiveness and efficiency than court litigation. The courts must enforce the liberal federal policy favoring arbitration even though they do not actually require arbitration to be efficient. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); see also *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). However inaccurate, the traditional assertion remains that parties agree to arbitrate because it is cheaper, faster and more efficient than litigating in federal court. Yet, if those goals have any hope of approaching actuality or meeting the jurisprudential aspiration of arbitration hypothesized as an adequate forum for the effective vindication of parties' rights, this court must hold the FAA does not prohibit class arbitration and that due deference must be accorded the award of arbitrators making a purely procedural decision. See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002).

The decision of the arbitrators to proceed in a class arbitration process is well within their authority to determine the procedures to be used in arbitration where the parties do not elect any particular set of arbitration rules. It is consistent with the unquestioned authority of arbitrators, especially international arbitrators, to devise the procedures for and to interpret any rules under which they conduct arbitration. It is also compliant with the longstanding federal policy interpreting any ambiguity concerning the subjects of arbitration in favor of the broad application of arbitration. See *Moses H. Cone Mem'l Hosp.*, 460 U.S. 1, 24 (1983). The decision of the

arbitrators before this court is a classic decision of procedural arbitrability expressly reserved to the arbitrators. See *Howsam*, 537 U.S. at 84-85. The award of the arbitrators constitutes neither manifest disregard of the law, nor any other violation of FAA Section 10 capable of review. Indeed, the decision of the arbitrators is not a final decision of anything creating jurisdiction in this court because it is not a final award of any issue concerning the merits of the parties' dispute and the present appeal is based on the parties' contractual creation of federal jurisdiction for review inconsistent with the decision in *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). The decision demonstrates that the arbitrators properly perceived the dispute before them as effectively a common disagreement between two sets of parties arguing over whether the same facts and law constitute a violation of the antitrust laws. Those common issues are unquestionably subject to arbitration. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

Access to class arbitration in "silent" arbitration clauses is essential for all small businesses to cost effectively vindicate their rights. Large businesses today routinely avoid arbitrating with other businesses of similar size and reserve arbitration provisions for use against consumers, employees and small business. See Theodore Eisenberg, Geoffrey Miller and Emily Sherwin, *Mandatory Arbitration for Customers But Not for Peers: A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts*, 92 JUDICATURE 118 (2008); see also Theodore Eisenberg, Geoffrey Miller and Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer*

Contracts, 41 U. MICH. J.L. REFORM 871 (2008). Those two studies confirm that small businesses are as regularly victimized by the excessive expenses, inefficiencies and disadvantages of arbitration as consumers, employees and franchisees. That fact is being brought to the attention of Congress, though it remains unacknowledged by the large business associations purporting to speak for "business." Arbitration's notorious ability to accomplish "do it yourself law reform" for those seeking to immunize themselves from inconvenient laws and unprofitable contract obligations is well known and has drawn the hostile attention of Congress. *See Eisenberg, Miller and Sherwin*, 92 JUDICATURE 118. However, that nefarious ability rests on a foundation of individual arbitrations. The expensive administered arbitrations now imposed on small business in many contracts consistently deprive them of any real individual ability to efficiently and effectively protect their rights. Class arbitration restores balance to international and domestic commerce and advances the policies of the antitrust laws.

Nothing in the FAA states that when arbitration clauses are silent on the issue of class arbitration it should be prohibited. Class arbitration is one of the few mechanisms available to small businesses that attempts to make arbitration fair, functional and affordable by offsetting the routine manipulations of many modern arbitration clauses. Small businesses are frequently deterred from pursuing legitimate grievances or asserting counterclaims in arbitration by the excessive expenses of AAA arbitrations, which today often exceed a small business's annual profits. Confidentiality rules and orders frequently operate to conceal unfavorable awards, which together with the

refusal of arbitrators to accept estoppel, makes arbitrations expensive and inefficient. That harms small businesses in single arbitrations, but unduly benefits those "repeat players" able to afford to repeatedly arbitrate the same contracts and issues and obtain advantage from any inconsistent awards. When the unfair knowledge of unfavorable potential arbitrators by "repeat player" large businesses is factored into the analysis, small businesses are seriously disadvantaged in individual arbitrations. Preserving access to class arbitration, especially when the arbitration clause is silent on the issue of class arbitration, will help to restore some claim by arbitration to offer a fundamentally fair forum and is critical to small business's ability to afford to protect its rights and remain in business. The authority of arbitrators to decide that the procedures to be followed in arbitration, where the clause is silent on the issue of class arbitration, should be affirmed and accorded the deference due any decision of procedural arbitrability. See *Howsam*, 537 U.S. at 85.

ARGUMENT

I. SILENCE IN ARBITRATION AGREEMENTS IS UNREMARKABLE AND THE FAA RECOGNIZES THE AUTHORITY OF ARBITRATORS TO DETERMINE THE PROCEDURES TO BE USED IN INTERNATIONAL AND DOMESTIC ARBITRATIONS.

The failure of contracting parties to provide for every potentiality is a pedestrian problem of contract law. Only a naive view of contracts would contend that all contractual relations are controlled by the parties'

express intentions and those alone. Contracting parties often fail to foresee contingencies that may or may not arise during performance. Perhaps more frequently, parties evade express negotiations or agreement on issues that are completely foreseeable because it would be costly to expressly provide for them. The arbitration clauses at issue here were negotiated between some of the most sophisticated and economically equal parties in the commercial world. They are the theoretical ideal of the coldly calculating corporate party. It is undisputed that they are extremely knowledgeable of their interests and well able to effectively analyze the risk - benefit ratio of including or excluding any particular clause in their contracts. No parties to any other type of arbitration agreement have a more comprehensive capability of asserting their interests in a contract.

These parties knew that their contract was "incomplete," as is almost every contract. Therefore, they also recognized that "it falls to public institutions - courts and legislatures - to create background or 'default rules' to govern private relationships when such unaddressed contingencies arise and private ordering has thus failed." *See* Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 609 (1998). They declined to make express a provision for their now asserted interests and entrusted their fate to the arbitrators to act rationally and efficiently.

The commentary of the contract 'default rules' arena has long been dominated by a law and economics approach primarily focused on the view that 'default rules' are particularly appropriate for efficiency analysis. The basis of an economic analysis of 'default

rules' is centered on transaction costs. With perfect information, perfect foresight and in the absence of transaction costs, parties would contract in complete detail and would achieve maximum contract efficiency. That is not reality and parties often fail to create efficient contract terms and remain silent regarding potential contingencies because the transaction costs, or their cost benefit calculations, counsel silence. In that event, the law via courts and arbitrators must supply efficient terms which minimize the transaction costs to the parties by providing "off the rack" provisions that are efficient and avoid the cost of creating them. *See id.* at 613 - 615. If contracts are a scheme of rational cooperation for mutual advantage, then omissions should be completed by reasonable terms. "Where there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy ..." See RESTATEMENT (SECOND) OF CONTRACTS, §204. Courts and arbitrators have recognized that the completion of incomplete contracts is inevitable and have addressed that task with a view to justice, fairness and efficiency. Fairness and justice aside, even a cursory review of the inefficiencies and astronomical costs that would be imposed by precluding class arbitration compel the conclusion that the FAA does not prevent the use of class arbitration when parties' arbitration agreements are silent.

The newly released 6th Annual Litigation Trends Survey Report from Fulbright & Jaworski, L.L.P., reveals that $ 50,000.00 is now the median cost of a domestic arbitration. See Fulbright and Jaworski, L.L.P, *Fulbright's 6th Annual Litigation Trends Survey* (2009), *available at* http://www.fulbright.com/litigation

trends06. That study was not available to former Chief Justice Rhenquist when he suggested in his dissent in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 459 (2003), that in the face of a silent arbitration clause, 3,734 separate arbitrations were appropriate. Had the Chief Justice known that it would cost an estimated $186,700,000.00 to conduct those arbitrations, he may have reconsidered his view. All too often the cost of an individual arbitration exceeds $100,600.00 in arbitrators' fees and AAA administrative fees and incurs a total cost of prosecution of about $ 247,000.00. See *Dealer Computer Servs., Inc. v. Hammonasset Ford Lincoln-Mercury, Inc.*, Civil Action H-08-1865, 2008 U.S. Dist. LEXIS 103683 (S.D. Tex. Dec. 22, 2008); *Kemp Ford, Inc. v. Dealer Computer Servs., Inc.*, Civil Action No. 4:09-cv-01315 (S.D. Tex., May 25, 2009). If class arbitration becomes unavailable because it is not expressly allowed by an arbitration clause, those small businesses would be facing the prospect of having to pay the AAA $120,000,000 to arbitrate the same issue 2,400 times before 7,200 arbitrators and another $45,300,000 to arbitrate a different set of common issues 450 times before another 1,350 arbitrators. No clearer demonstration of the irrational and astronomically excessive cost and inefficiency of individual AAA arbitrations in place of a single class arbitration is possible. Furthermore, prohibiting class arbitration poses additional risks from the inevitability that those 8,550 arbitrators will issue 2,850 potentially inconsistent awards. President Barak Obama, in his weekly radio address on October 24, 2009, observed that "Small businesses have always been the engine of our economy -- creating 65 percent of all new jobs over the past decade and a half -- and they must be at the forefront of our recovery." Barak Obama, U.S. President, Weekly Address: Working

with Small Business to Drive Recovery (October 24, 2009), *available at* http://www.whitehouse.gov/photos-and-video/video/weekly-address-working-with-small-business-drive-recovery-0. If small business is compelled to spend hundreds of millions of dollars on duplicative and superfluous arbitrations, they will not be able to survive, much less thrive and revive the American economy. Preserving access to class arbitration is essential for all small businesses to be able to effectively and efficiently vindicate their rights.

Access to class arbitration in "silent" arbitration clauses is essential for all small businesses to cost effectively vindicate their rights. Contemporary research discloses that large businesses routinely avoid arbitrating with other businesses of similar size. They now reserve arbitration for use against consumers, employees and small business. *See Eisenberg, Miller and Sherwin,* 92 JUDICATURE 118 (2008). Small businesses are as regularly victimized by the excessive expenses, inefficiencies and disadvantages of individual administered arbitration as consumers, employees and franchisees. They are making that fact known to Congress and providing information in support of the Class Action Fairness Act of 2005. *See* Class Action Fairness Act of 2005, 28 U.S.C. Sections 1332(d), 1453, and 1711-1715. The unfortunate use of arbitration as a "do it yourself law reform" for those seeking to immunize themselves from inconvenient laws and unprofitable contract obligations has also drawn the hostile attention of Congress. See *Eisenberg, Miller and Sherwin,* 92 JUDICATURE 118 (2008); see also *Eisenberg, Miller and Sherwin,* 41 U. MICH. J.L. REFORM 871 (2008). The expensive administered arbitrations now imposed on small business in many contracts deprive them of

any real individual ability to efficiently and effectively protect their rights. Class arbitration restores balance to international and domestic commerce and advances the policies of the antitrust laws.

The FAA is a minimalist statute that makes no prescriptions regarding class arbitration. It leaves the conduct and procedures of arbitration to the parties or the arbitrators. Nothing in the FAA requires that when arbitration clauses are silent on the issue of class arbitration it should be prohibited. Class arbitration attempts to make arbitration fair, functional and affordable by offsetting the routine manipulations of many modern arbitration clauses. It alleviates the cost deterrence encountered by small businesses when they consider pursuing grievances or asserting counterclaims in arbitration due to the excessive expenses of AAA arbitrations. As those costs often exceed a small business's annual profits, efficient and cost effective arbitration is essential. Class arbitration also remedies the negative aspect of arbitration confidentiality rules and orders which frequently operate to conceal unfavorable awards. That along with the refusal of arbitrators to accept estoppel makes individual arbitrations too expensive and inefficient. Class arbitration also addresses and corrects the unfair benefits to those "repeat players" able to afford to regularly re-arbitrate the same contracts and issues obtained from any inconsistent awards. Preserving access to class arbitration, especially when the arbitration clause is silent on the issue of class arbitration, will help to restore some claim by arbitration to offer a fundamentally fair forum and is critical to small business. The authority of arbitrators to decide the procedures to be followed in arbitration where the clause is silent on the issue of

class arbitration should be affirmed and accorded the deference due any decision of procedural arbitrability. See *Howsam*, 537 U.S. at 84-85.

II. THE FAA IS A MINIMALIST STATUTE FOCUSED ON GIVING EFFECT TO ARBITRATION AGREEMENTS AND AWARDS WITHOUT MANDATING ANY PARTICULAR PROCEDURES. THE FAA RECOGNIZES THE AUTHORITY OF THE ARBITRATORS TO DETERMINE THE PROCEDURES TO BE USED IN INTERNATIONAL AND DOMESTIC ARBITRATIONS.

The FAA is an economical statute governing both domestic and international arbitrations. It is focused on giving effect to parties' arbitration agreements and awards, but it neither mandates nor prohibits the use of any particular arbitration procedures. As arbitration is a dynamic creature of contract, those procedures can and do evolve to meet the contemporary needs of business. Sections 201 *et seq.* and 301 *et seq.* of the FAA specifically relate to international arbitrations, but rely on the general provisions of 9 U.S.C. Section 1 *et seq.* to establish the foundation for all domestic and international arbitration in the United States. In a classic concession to federalism, FAA Section 2, in turn, makes contracts to arbitrate irrevocable and enforceable, except where general state contract law provides otherwise. While the case before the court is classically international and maritime, the issue to be decided will have an extraordinary impact on every business and consumer in America. This case implicates two of the most fundamental aspects of arbitration, 1) what procedures may arbitrators use in

the face of contract silence, and 2) who ultimately determines what the arbitrators may decide. Professor Alan Rau elegantly summarized the issues in posts responding to Philip Loree's incisive observations on the Disputing blog and noted that this case really presents two 'default rule' questions. "What is the 'default rule' regarding class or consolidated arbitration? Class or consolidated arbitration, or not?" "What is the 'default rule' as to who decides the class or consolidation issue? Who is the ultimate decision-maker, the court or the arbitrators?"

Neither of these issues would need to be addressed, if the parties chose to elect and incorporate express contract terms on these points. Where arbitrators are faced with silence, they look to the rules of law relating to contract interpretation and supplementation. When the silence relates to procedural issues, such as the availability of class arbitration, it is a truism that the parties grant the arbitrators the authority to determine "the procedure to be used." See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

Commentators long ago observed that sophisticated parties in particular know that no uniform body of procedural rules control international arbitrations. The very multiplicity and variety of the potential procedures counsels careful drafting because the law of the place of the arbitration rarely prescribes or prohibits any particular arbitration procedures. The absence of any statutorily mandated procedures and the fact that arbitration is a private contractual process inevitably means that the procedures for conducting the arbitration are determined by the arbitrators. Where parties elect no institutional rules in the arbitration clause, the orders and rulings of the

arbitrators prescribe the arbitration procedures. Judge Howard Holtzmann best articulated the situation when he noted:

"U.S. arbitration statues and decisions contain few specific requirements regulating the conduct of the arbitration and leave such matters to the agreement of the parties or to the arbitration rules that the parties have agreed shall be followed. **In the absence of agreement of the parties or applicable rules, matters of procedure are left largely to the discretion of the arbitrators."** (emphasis supplied) 3 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 19 (Pieter Sanders & Albert Jan Van Den Berg eds., 1984 & Supp. 13, 1992).

Sophisticated parties have known for decades that the complexities of contemporary commerce inevitably mean that any transaction can engender a multiplicity of interested parties. The failure of the parties to expressly address this issue is surprising considering that class arbitration has been widely known in the United States for decades and was referenced in *Southland Corp. v. Keating*, 465 U.S. 1 (1984). That makes the silence of the arbitration provisions at issue more of a "choice" than at first appears. The parties "silence," whether by inadvertence or calculation has created a classic "gap" in their agreement. The arbitrators were entitled to consider that the parties should have an obvious interest in avoiding multiple exceedingly expensive, inefficient and inconsistent individual arbitration proceedings potentially requiring decades to complete. The true, legitimate comparison for consideration by the arbitrators was between class arbitration and innumerable individual arbitrations, not between class arbitration and class

actions in the courts. Thus, the usual and expected understanding of the parties is that they have entrusted to the arbitrators the discretion to prescribe the procedures to be followed in the arbitration. The arbitrators are correctly empowered to "fill the gap" so as to advance the expected objective of rational parties to obtain efficient, cost effective arbitrations in a reasonable time frame.

Parties know that often the existence of an arbitration agreement may offer a sword or a shield to interested nonsignatories and the cases are legion articulating the various bases for nonsignatories' use of arbitration clauses. The fact remains that the parties are in the best position to provide or prohibit any particular arbitration provisions to be used or excluded. Where they have adopted broad arbitration provisions providing, in the Vegoilvoy charter-party for the arbitration of "any dispute arising from the making, performance or termination of this Charter Party ..." or in the Asbatankvoy charter-party providing for the arbitration of "any and all differences and disputes of whatsoever nature arising out of this Charter ..." they commit the determination of the arbitration procedures to the arbitrators. *See* VEGOILVOY form, JA 9a, @JA 30 a; ASBATANKVOY form JA 32a, @JA 50a – 51a. That decision, like any other award regarding arbitration procedures must be deferred to and subjected to only limited review. See *Howsam*, 537 U.S. at 84-85.

The decision of the arbitrators to proceed in a class arbitration process is well within their authority to determine the procedures to be used in this arbitration where the parties did not specify or select any particular set of arbitration rules. Their decision is

consistent with the unquestioned authority of arbitrators, especially international arbitrators, to devise the procedures for and to interpret any rules under which they conduct arbitration. It is also compliant with the longstanding federal policy interpreting any ambiguity concerning the subjects of arbitration in favor of the broad application of arbitration. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). The decision of the arbitrators before this court is a classic decision of procedural arbitrability expressly reserved to the arbitrators. See *Howsam*, 537 U.S. at 84-85. The award of the arbitrators does not violate any provision of FAA Section 10, nor is it in manifest disregard of the law. In fact, it is hardly surprising that given the expertise of the arbitral tribunal selected they should feel perfectly entitled to determine the procedural issue of class arbitration contrary to the opinions of the hired maritime law "experts." Their decision demonstrates that the arbitrators properly perceived the dispute before them effectively as a common disagreement between two sets of parties arguing over whether the same facts and law constitute a violation of the antitrust laws. See *Mitsubishi*, 473 U.S. at 614. Those common issues are unquestionably subject to arbitration and the arbitrators were well within their authority to decide that class arbitration is the most cost effective and efficient mechanism for determining that dispute.

Consequently, the two questions which began this argument must be answered consistent with the FAA as follows:

"What is the 'default rule' regarding class or consolidated arbitration? Class or consolidated arbitration, or not?"

The answer under the FAA is that the 'default rule' permits class or consolidated arbitration.

"What is the 'default rule' as to who decides the class or consolidation issue? Who is the ultimate decision-maker, the court or the arbitrators?"

The answer under the FAA is that the 'default rule' must be that the ultimate decision-maker for all issues of procedure is the arbitration tribunal.

Finally, it should be noted that the decision of the arbitrators is not a final decision of anything, and is a questionable basis for creating jurisdiction in this Court. The award at issue is a purely procedural determination that does not constitute a final award of any issue concerning the merits of the parties' dispute. Indeed, the present appeal could easily be viewed as based on the parties contractual creation of federal jurisdiction for review inconsistent with the decision in *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

III. NO REAL ISSUE EXISTS CONCERNING ARBITRATOR SELECTION AND THE PROVISIONS OF THE TWO CHARTER PARTIES ARE EASILY HARMONIZED.

At first appearance the arbitrator selection process seems to present an issue. However, when the language of the arbitration provisions are carefully reviewed, that issue evaporates. Respondent is

seeking class arbitration, so it will presumably agree to use whichever contractual arbitrator selection standards that Petitioner demands. Whether the more or the less restrictive methods are elected by Petitioner, Respondent can agree to preserve its right to class arbitration. Such acquiescence would eliminate any potential problem and would be consistent with the parties' ability to jointly modify their agreement to arbitrate at any time. The remainder of the differences in the contracts are irrelevant because all of the Respondent's contracts and many of the contracts of the members of the putative class have identical arbitration provisions. This is analogous to the situation in *Bazzle* where the various contract provisions were similar, but not precisely identical. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

IV. THE JURISPRUDENCE OF THE FAA REQUIRES ACCORDING THE AWARD OF THE ARBITRATORS THE DEFFERENCE DUE EVERY OTHER DECISION DETERMINING ARBITRAL PROCEDURE AND CONTRACT INTERPRETATION.

The court should conclude that the award of the arbitrators was a legitimate exercise of their authority to interpret the contract, albeit by reasonably filling a gap in a silent agreement with logical and rational "default" procedural provisions. In that event the deferential standard of review due to such awards is well known to the court and will not be repeated here.

* * * *

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit Court of Appeal should be affirmed.

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October 27, 2009

AMICUS CURIAE BRIEF

(11)

No. 08-1198

SUPREME COURT
SEP 3 - 2009

IN THE

Supreme Court of the United States

STOLT-NIELSEN S.A., *et al.*,
Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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IN THE

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No. 08-1198

STOLT-NIELSEN S.A., *et al.*,
Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*.[1] The brief supports the position of Petitioners before this Court in favor of reversal.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes approximately 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the legal and practical considerations relevant to interpreting and complying with workforce nondiscrimination requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e *et seq.*, the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. §§ 621 *et seq.*, the Americans with Disabilities Act of 1990 (ADA), as amended, 42 U.S.C. §§ 12101 *et seq.*, and other employment-related statutes and regulations. Many of EEAC's members have contracts with their employees governing some or all terms and conditions of employment. Some of these contracts include agreements to arbitrate disputes arising out of the employment relationship.

EEAC's members have an ongoing interest in preserving the enforceability of agreements calling for arbitration of employment-related disputes. Arbitration is a flexible, efficient, and effective alternative means of resolving discrimination claims and other employment-related issues. Agreements to arbitrate, like other privately negotiated contracts, afford parties the ability to establish procedures under which

any future disputes will be governed. It follows, then, that such agreements must be enforced according to their express terms so as to give meaning to the parties' intent.

Thus, the issue presented in this matter regarding whether the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, permits the imposition of class action procedures on a private commercial arbitration agreement even where the parties' agreement is silent regarding class arbitration is extremely important to the nationwide constituency that EEAC represents. Although the instant case involves arbitration of commercial disputes, the Court's decision likely will be construed as applying to arbitration of employment disputes as well.

Because of its interest in this subject, EEAC has filed *amicus curiae* briefs in numerous cases before this Court and the federal courts of appeals endorsing the strong public policy supporting private arbitration of individual disputes.[2] EEAC thus is familiar with the legal and public policy issues presented to the Court in this case. Because of its significant experience in these matters, EEAC is well situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioners Stolt-Nielsen S.A., Stolt-Nielsen Transportation Group Ltd., Odfjell ASA, Odfjell Seachem

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[2] *E.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. __, 129 S. Ct. 1456 (2009); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

AS, Odfjell USA, Inc., Jo Tankers B.V., Jo Tankers, Inc., and Tokyo Marine Co., Ltd., (collectively "Stolt-Nielsen") are owners of parcel tankers used to ship chemicals. Pet. App. 2a. Respondent AnimalFeeds International Corp. is a direct purchaser of parcel tanker transportation services. *Id.*

AnimalFeeds initially filed suit on September 4, 2003 in the U.S. District Court for the Eastern District of Pennsylvania against Stolt-Nielsen alleging that Stolt-Nielsen had caused AnimalFeeds to overpay for the shipment of goods, thereby engaging in a "global conspiracy to restrain competition in the world market for parcel tanker shipping services in violation of federal antitrust laws." *Id.* at 2a-3a.

During 2003 and 2004, similar suits were filed against Stolt-Nielsen by other claimants in the U.S. District Courts of Connecticut, Pennsylvania, and Texas. *Id.* at 46a. The combined cases subsequently were transferred to the District of Connecticut, where Stolt-Nielsen moved to compel arbitration pursuant to the arbitration clauses contained in its shipping agreements. *Id.* at 3a, 46a. The district court denied the motion, but the Second Circuit reversed, holding that the parties' contracts contained enforceable arbitration provisions and thus the antitrust claims were arbitrable. *Id.* at 3a. On May 19, 2005, AnimalFeeds and several other co-plaintiffs filed a demand for class arbitration. *Id.* at 36a. Stolt-Nielsen objected and an arbitration panel was appointed to decide the dispute. *Id.*

The arbitration panel reviewed the relevant contracts between the parties and determined that the arbitration clauses in each were silent as to class arbitration. *Id.* at 37a. The question before the panel, then, was whether that silence permitted or

precluded class arbitration. *Id.* at 48a. AnimalFeeds argued that because the arbitration clauses were silent as to class arbitration, class arbitration was permissible. *Id.* at 6a. It contended that other arbitrators had construed similar clauses as allowing for class arbitration and argued that depriving them of the class procedure contravened public policy. *Id.*

Stolt-Nielsen, relying on several federal cases and arbitration rulings in which such silence was deemed to bar class arbitration, argued that because the arbitration clauses were silent, the parties did not assent to class arbitration and thus it could not be imposed by the arbitration panel. *Id.* Stolt-Nielsen also noted that the cases cited by AnimalFeeds were inapposite, as they were not decided in the context of international maritime agreements, in which the parties generally have no expectation of class arbitration. *Id.*

On December 20, 2005, the panel issued a Clause Construction Award concluding that Stolt-Nielsen had not established conclusively that the parties intended to preclude class arbitration, and therefore the arbitration could proceed on a class-wide basis. *Id.* at 7a. Stolt-Nielsen petitioned the U.S. District Court for the Southern District of New York to vacate the panel's decision, which it did, concluding that the arbitration panel's ruling was in "manifest disregard of the law." *Id.* at 8a. The district court found that the panel had not accounted for federal maritime law, which "requires that the interpretation of charter policies be dictated by custom and usage." *Id.* Because Stolt-Nielsen had demonstrated that maritime arbitration clauses are never subject to class arbitration, the court concluded the arbitration panel should not have found such procedures applicable to this case. *Id.*

On appeal, the U.S. Court of Appeals for the Second Circuit reversed, concluding that the "manifest disregard" standard was not met in this case. Pet. App. 32a. The appeals court acknowledged the case law prohibiting class arbitration where not expressly provided for in the parties' agreement, but nevertheless determined that those cases do not "establish law that is so clearly and plainly applicable that we are compelled to conclude that the arbitration panel willfully ignored it, thereby manifestly disregarding the law." Pet. App. 28a. In doing so, it misconstrued this Court's holding in *Bazzle* as standing for the proposition that class procedures may be imposed in arbitration where the argument is silent. Stolt-Nielsen petitioned for a writ of certiorari, which this Court granted on June 15, 2009. *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l, Inc.*, *cert. granted*, 129 S. Ct. 2793 (2009) (No. 08-1198).

SUMMARY OF ARGUMENT

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et seq.*, requires judicial enforcement of a valid agreement to arbitrate in accordance with its terms. Thus, where the parties to an arbitration agreement have not expressly provided for the right to pursue class action procedures, the FAA prohibits a court from ordering class-wide arbitration. As this Court has observed, "the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Boyd*, 470 U.S. 213, 218 (1985) (emphasis in original).

Most federal courts to address the issue have ruled that the FAA precludes class-wide arbitration where the arbitration agreement is silent as to the availability of class action procedures. *See, e.g., Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219 (2d Cir. 2001); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814 (11th Cir. 2001); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000); *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995). Drawing support from a line of federal circuit court decisions that have refused to order *consolidated* arbitration where the arbitration agreement does not expressly provide for it, these courts have applied the same reasoning to preclude *class-wide* arbitration absent express contractual language providing for class action procedures.

In *Gilmer v. Interstate/Johnson Lane Corp.*, this Court observed that by agreeing to submit their disputes to arbitration, parties voluntarily exchange "the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." 500 U.S. 20, 31 (1991) (citation and internal quotation omitted). Indeed, parties to arbitration agreements routinely waive procedural mechanisms that otherwise would be available in litigation in favor of having their disputes heard quickly and less expensively in an arbitral forum. The class action is simply one of many courtroom procedures that is waived when a party agrees to submit its disputes to arbitration.

Allowing individuals subject to private arbitration agreements to pursue claims on a class-wide basis would defeat most, if not all, of the practical advan-

tages and mutual benefits of arbitration, particularly in the employment context. As this Court has observed, "the relative informality of arbitration is one of the chief reasons that parties select arbitration." *14 Penn Plaza LLC v. Pyett*, 556 U.S. __, 129 S. Ct. 1456, 1471 (2009).

Disputes are resolved far more quickly in an arbitral forum; the average length of an arbitration from filing to award is five months. Michael J. Schroeder, *Take the Lawyers Out of the Loop—Help Yourself and Your Patients*, Acupuncture Today (Apr. 2001).[3] As this Court noted in *Circuit City Stores, Inc. v. Adams*, arbitration agreements also "allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation . . . ." 532 U.S. 105, 123 (2001). Indeed, parties "generally prefer arbitration precisely because of the economics of dispute resolution." *14 Penn Plaza*, 129 S. Ct. at 1464.

These benefits would be significantly diminished, if not lost altogether, if complex class action procedures were imposed in arbitration in the absence of the parties' mutual assent. Such a result would significantly discourage the use of agreements to arbitrate in the employment setting and would run counter to the strong federal public policy, endorsed time and again by this Court, favoring private arbitration.

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[3] *available at* http://www.adrforum.com/main.aspx?itemID=565&hideBar=False&navID=230&news=3

ARGUMENT

I. A RULE THAT ALLOWS CLASS ARBITRATION TO BE INCORPORATED INTO AN AGREEMENT THAT IS SILENT AS TO THE AVAILABILITY OF CLASS-WIDE ARBITRATION RUNS COUNTER TO THE PLAIN LANGUAGE OF THE FEDERAL ARBITRATION ACT

A. The FAA Requires That A Valid Arbitration Agreement Be Enforced As The Parties Wrote It

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, provides that an arbitration agreement "shall be valid, irrevocable, and enforceable save upon such grounds as exist in law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has observed:

> Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

The FAA was enacted, in part, "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements on the same footing as other contracts." *Gilmer v. Interstate /Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89 (2000); *EEOC v. Waffle House, Inc.*, 534 U.S.

279, 289 (2002). Thus, "'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration,'" *Gilmer,* 500 U.S. at 26 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24), a policy which this Court has reaffirmed repeatedly in the years since *Gilmer* was first decided.

As a general rule, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 26 (citation and internal quotation omitted). Consequently, when presented with a valid arbitration agreement, "the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Boyd*, 470 U.S. 213, 218 (1985) (emphasis in original); *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. __, 129 S. Ct. 1456, 1465 (2009).

Section 4 of the FAA provides, in relevant part that:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4. Once it is determined that the agreement to arbitrate is valid and addresses the disputed claim, "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.*

This Court repeatedly has recognized the FAA's emphasis on construing arbitration agreements in

accordance with the parties' desires and expectations. "The FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). As this Court observed in *Green Tree Financial Corp. v. Bazzle*, "we rigorously enforce agreements to arbitrate . . . in order to give effect to the contractual rights and expectations of the parties." 539 U.S. 444, 458 (2003) (citations and internal quotations omitted). *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("as with any other contract, the parties' intentions control").

Furthermore:

> Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, . . . so too may they specify by contract the rules under which that arbitration will be conducted.

Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 479 (1989).

B. The Predominant View Of The Circuit Courts Of Appeals Is That The FAA Plainly Bars The Merging Of Individual Claims In Arbitration Where The Parties' Agreement Is Silent On The Availability Of Class Action Procedures

Eight of the thirteen circuit courts of appeals now have concluded that Section 4 of the FAA prohibits imposing class action procedures or consolidating individual arbitrations when the arbitration agree-

ment is silent as to the availability of such procedures. *Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219 (2d Cir. 2001); *see also Gov't of the United Kingdom v. Boeing*, 998 F.2d 68 (2d Cir. 1993); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987); *American Centennial Ins. Co. v. National Cas. Co.*, 951 F.2d 107 (6th Cir. 1991); *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814 (11th Cir. 2001). As the Second Circuit observed, "[T]he FAA mandates enforcement of the bargains struck by the parties and nothing more. Furthermore, our sister circuits have arrived at the same conclusion." *Hartford*, 246 F.3d at 229.

Citing to its earlier ruling in *United Kingdom*, the Second Circuit in *Hartford* pointed out that while:

> [I]nefficiencies and possible inconsistent determinations . . . may result absent consolidation . . . such concerns, though valid, do not provide us with the authority to reform the private contracts and that if contracting parties wish to have all disputes that arise from the same factual situation arbitrated in a single proceeding, they can simply provide for consolidated arbitration in the arbitration clauses to which they are a party.

246 F.3d at 229 (quoting *Gov't of U.K. v. Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993) (internal quotations omitted)). Applying the Second Circuit's rationale, the Seventh Circuit in *Champ v. Siegel Trading Co.*

similarly ruled that Section 4 of the FAA prohibits a court from ordering class-wide arbitration "absent a provision in the parties' arbitration agreement providing for class treatment of disputes . . . ." *Champ*, 55 F.3d at 271.

Noting that the Second, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits all have refused to order *consolidation* where the arbitration agreement does not expressly provide for it, the court in *Champ* determined that the same reasoning applies to preclude *class-wide* arbitration absent express contractual language providing for class action procedures.[4] *Id.* at 274 (citations omitted). Observing that "the overriding goal of the FAA was to place private arbitration agreements on the same footing as other contracts negotiated between private parties," *id.* at 275, the Seventh Circuit concluded that since the arbitration agreement at issue was silent as to class arbitration, "[f]or a federal court to read such a term into the parties' agreement would 'disrupt[] the negotiated risk/benefit allocation and direct[] [the parties] to proceed with a different sort of arbitration.'" *Id.* (citation omitted).

In this case, the Second Circuit incorrectly determined that this Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), "abrogated [earlier circuit court] decisions to the extent that they read the FAA to prohibit such proceedings." Pet. App. 29a. In fact, the question whether class procedures may be imposed where the applicable arbitration agreement is completely silent as to the

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[4] Subsequent to the court's holding in *Champ*, the Third Circuit adopted a similar rationale in *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000).

availability of such procedures was left unresolved by this Court, which held only that the threshold determination as to whether or not an agreement, in fact, is silent as to class arbitration is for the arbitrator, not a court, to decide. *Id.* The Second Circuit's misapplication of *Bazzle* resulted in its erroneous reversal of the district court's ruling below.

II. THIS COURT'S RULING IN *GILMER* RECOGNIZES THE RIGHT OF PRIVATE PARTIES TO WAIVE JUDICIAL PROCEDURES IN FAVOR OF ARBITRATION OF INDIVIDUAL DISPUTES

This Court in *Gilmer* put to rest any lingering questions regarding whether arbitration procedures, as a general principle, are adequate to resolve statutory claims, concluding that "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" 500 U.S. at 31 (citation omitted). The Court reiterated that view last term in *14 Penn Plaza v. Pyett,* in which it observed, "[t]he decision to resolve . . . claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace . . . discrimination; it waives only the right to seek relief from a court in the first instance." 129 S. Ct. at 1469.

By contrast, the "right" to bring a class action "is merely a procedural one, arising under Fed. R. Civ. P. 23, that may be waived by agreeing to an arbitration clause." *Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000). As the Seventh Circuit noted in *Champ*:

> When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish

> the right to certain procedural niceties which are normally associated with a formal trial. One of those "procedural niceties" is the possibility of pursuing a class action under Rule 23.

55 F.3d at 276 (citations omitted).

Parties to arbitration agreements often agree to streamlined procedural mechanisms that do not allow for claims to be brought on a class-wide basis. "[S]imply because judicial remedies are a part of a law does not mean that Congress meant to preclude parties from bargaining around their availability." *Johnson*, 225 F.3d at 377. In fact, "[a]rbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (citations and internal quotations omitted).

As this Court observed in *Volt Information Sciences, Inc. v. Board of Trustees*, "[j]ust as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which the arbitration will be conducted." 489 U.S. 468, 476 (1989). A rule that allows courts to read into a valid arbitration agreement the availability of class-wide arbitration where the parties have not expressly assented to it would ignore these well-established principles of contract law and would undermine the strong federal public policy, as articulated time and again by this Court, favoring arbitration.

Furthermore, when an individual party waives class action procedures, the ability of other private parties not subject to arbitration agreements to pursue class-wide relief in court is not affected. More-

over, as this Court made clear in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), public enforcement agencies not privy to arbitration agreements and where specifically authorized by statute may continue to seek victim-specific relief in court, whether on behalf of an individual or an entire class. Accordingly, to the extent that the threat of class action litigation may serve as a strong deterrent against violations of the law, the prohibition of class-wide arbitration will have little, if any, effect on the availability of such procedures to those not subject to an arbitration agreement.

III. PERMITTING INDIVIDUALS SUBJECT TO PRIVATE ARBITRATION AGREEMENTS TO PURSUE CLAIMS ON A CLASS-WIDE BASIS DEFEATS MOST, IF NOT ALL, OF THE PRACTICAL ADVANTAGES AND MUTUAL BENEFITS OF ARBITRATING EMPLOYMENT DISPUTES

In most cases, arbitration enables parties to resolve disputes more quickly and more efficiently than in litigation. Chief Justice Burger once observed:

> The reasons for favoring arbitration are as wise as they are obvious: litigation is costly and time consuming, and, more to the point in this case, judges are less adapted to the nuances of the disputes that typically arise in shops and factories than shop stewards, business agents, managerial supervisors, and the traditional ad hoc panels of factfinders. By bringing together persons actually involved in the workplace, often assisted by a neutral arbitrator experienced in such matters, disputes are resolved more swiftly and cheaply. This mechanism promotes industrial harmony

> and avoids strikes and conflicts; it provides a swift, fair and inexpensive remedy.

Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 747-48 (1981) (Burger, C.J., dissenting) (citation omitted).

Indeed, the speed with which most disputes are resolved through arbitration far outpaces the judicial system. The federal district courts take an average of 25.3 months to complete a civil case through jury trial. Admin. Office of the U.S. Courts, Fed. Judicial Caseload Statistics, Table C-5 (Apr. 1, 2007—Mar. 31, 2008)[5]. And, according to a study by the Federal Judicial Center, "the median time from filing to disposition for *class actions* tends to be *two to three times* that of other civil cases." (emphasis added). Admin. Office of the U.S. Courts, *The Third Branch*, Vol. 34, No. 5 (Apr. 2002).[6] In contrast, according to the National Arbitration Forum, the "average length of [an arbitration] from filing to award was 4.35 months for claims brought by consumers against businesses and 5.6 months for claims brought by businesses against consumers." Nat'l Arbitration Forum, *The Benefits of Arbitration* (Sept. 2007 & Supp. Apr. 2009).[7]

In addition to reducing the amount of time within which their disputes are likely to be heard, arbitration provides employees with a better chance of having their "day in court" than does a judicial proceed-

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[5] *available at* http://www.uscourts.gov/caseload2008/tables/C05Mar08.pdf

[6] *available at* http://www.uscourt.gov/ttb/apr02ttb/actionbill.html

[7] *available at* http://www.adrforum.com/main.aspx?itemID=1293&hideBar=False&navID=6&news=3#Time

ing. "Arbitration also offers employees a guarantee that there will be a hearing on the merits of their claims; no such guarantee exists in litigation where relatively few employees survive the procedural hurdles necessary to take a case to trial in the federal courts." *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1488 (D.C. Cir. 1997).

Procedural rights, such as class action procedures, the right to a jury trial, and extensive (and often excessive) discovery, mean little to an employee who is unable to find an attorney to take his or her case. Such an employee likely will feel that the doors to justice are closed to them. Arbitration gives these employees a timely opportunity to have their claims heard. Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* (Cornell Univ. Press, 1997), at 159.

Also, as this Court noted in *Circuit City Stores, Inc. v. Adams*, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation . . . ." 532 U.S. 105, 123 (2001). Indeed:

> Most employees simply cannot afford to pay the attorney's fees and costs that it takes to litigate a case for several years. Even when an employee is able to engage an attorney on a contingency fee basis . . . the employee nonetheless often must pay for litigation expenses, and put working and personal life on hold until the litigation is complete.

Bales at 153-54. As a practical matter, "[a]rbitration thus provides access to a forum for adjudicating employment disputes for employees whom the litigation system has failed." Bales at 159 (footnote omitted).

Unlike the typical arbitration, employment class actions can involve thousands of class members and can be extremely complex and time-consuming to defend. For defendants, the significantly higher costs and exposure posed by class actions creates enormous pressure to settle rather than run any risk of catastrophic loss. "Once one understands that the issues involved in the instant case are predominantly case-specific in nature, it becomes clear that there is nothing to be gained by certifying this case as a class action; nothing, that is, except the *blackmail value* of a class certification that can aid the plaintiffs in coercing the defendant into a settlement." *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) (emphasis added). As the Fifth Circuit has recognized:

> In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.

Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (citations and footnote omitted).

This immense pressure to settle exists largely independently of the merits of the underlying statutory claim:

> Once plaintiffs obtain class certification, the defendant's exposure, plus projected costs of defending hundreds or thousands of individual claims, places almost overwhelming and irresistible pressure on the defendant to settle, regardless of the merits of the claims. Even if individ-

> ual plaintiffs' odds of prevailing in their specific cases are low, the risk to defendants remains extremely high. In the face of these numbers, companies often perceive that they have little choice but to cut their losses through settlement.

Gary Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-The-Board Employment Discrimination Cases*, 15 The Labor Lawyer [ABA Sec. Lab. & Emp. L.] 415, 416 (2000) (footnotes omitted); *see also Castano*, 84 F.3d at 746 ("[c]lass certification magnifies and strengthens the number of unmeritorious claims" and "[a]ggregation . . . makes it more likely that a defendant will be found liable and results in significantly higher damage awards") (citations omitted). This predicament is evident particularly in the employment context, where several employers have settled large class action discrimination suits for hundreds of millions of dollars to avoid larger litigation costs. *See* Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 B.Y.U. L. Rev. 305, 344 (2001).

These astronomical numbers often give a defendant little choice but to cut its losses through settlement, regardless of the merits. Judge Posner observed in *In re Rhone-Poulenc Rorer, Inc.* that faced with billions of dollars in potential liability and possible bankruptcy as a result of a class action, employers "may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." 51 F.3d 1293, 1298 (7th Cir. 1995) (citation omitted). *See also In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 n.8 (3d Cir. 2001).

Even under the best of circumstances, there is some question as to whether class actions effectuate the purpose of the laws under which they are brought. Considering the incentives built into the class action format:

> [Class action attorneys] may be too willing to bring nonmeritorious suits if these suits produce generous financial rewards for them.
>
> * * *
>
> For society, however, there are substantial costs: lost opportunities for deterrence (if class counsel settled too quickly and too cheaply), wasted resources (if defendants settled simply to get rid of the lawsuit at an attractive price, rather than because the case was meritorious), and—over the long run—increasing amounts of frivolous litigation as the attraction of such lawsuits becomes apparent to an ever-increasing number of plaintiff lawyers.

Deborah R. Hensler, *et al.*, *Class Action Dilemmas: Pursuing Public Goals For Private Gain, Executive Summary*, RAND Institute for Civil Justice 9-10 (2000)[8].

Judge Posner warned in *Culver v. City of Milwaukee* that improperly certifying large class actions seeking substantial monetary relief would mean that "[r]ealistically, functionally, practically [plaintiffs' counsel] is the class representative, not [the named plaintiff]." 277 F.3d 908, 913 (7th Cir. 2002). In addition, plaintiffs' lawyers may have different goals from the class they represent. *Id.* at 910. Plaintiffs'

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[8] *available at* http://www.rand.org/pubs/monograph_reports/2005/MR969.1.pdf

lawyers even have reportedly boasted publicly about their own power, stating that "their goal is to bankrupt the defendant or, more colorfully, to 'blow them off the New York Stock Exchange.' This approach has been recognized in class cases as the principle of 'judicial blackmail.'" Piar, 2001 B.Y.U. L. Rev. at 343 (footnote omitted).

These class action problems are even more acute in the context of private arbitration, which by its very nature is designed to promote, rather than discourage, speedy, cost-effective resolution of individual claims in as non-adversarial a manner as possible. As this Court has observed, "the relative informality of arbitration is one of the chief reasons that parties select arbitration." *14 Penn Plaza*, 129 S. Ct. at 1471. Many employers view arbitration and other forms of alternative dispute resolution as an opportunity not only to resolve a specific dispute but also to preserve relationships with their employees, particularly those who will continue to work for them well after their claims are addressed.

Permitting class-wide arbitration where the parties have not explicitly agreed to pursue such procedures fundamentally undermines the benefits and advantages, and therefore would significantly discourage the use, of agreements to arbitrate in the employment setting. Many employers have adopted mandatory arbitration programs primarily to reduce litigation costs. If parties to private arbitration agreements were permitted to pursue disputes on a class basis, employers would be faced with the very burdens they sought to avoid by introducing mandatory arbitration programs.

To be sure, if employers wished to be subject to class-wide arbitration, they would express as much in

the terms of their arbitration agreements. As such, class-wide procedures should not be read into an arbitration agreement in the absence of express language providing for such procedures.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-1198

IN THE
Supreme Court of the United States

STOLT-NIELSEN S.A., *et al.*
Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, ALLIANCE FOR JUSTICE, ASIAN AMERICAN JUSTICE CENTER, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, AND NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether an arbitration panel's decision interpreting the parties' silence in its arbitration agreement as allowing class arbitration is entitled to great deference, given that the class-action device serves important public policy objectives.

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STATEMENT OF INTEREST

The following *amici* submit this brief, with the consent of the parties,[1] in support of Respondent's argument that the arbitration panel's decision that the parties' arbitration clause permits class arbitration should be upheld.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee, through its Employment Discrimination Project, has been involved in cases before the Court involving the interplay of arbitration clauses and the exercise of rights guaranteed by civil rights laws prohibiting employment discrimination.

Alliance for Justice is a national association of over 80 organizations dedicated to advancing justice and democracy. We believe all Americans have the right to secure justice in the

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[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with Clerk of the Court pursuant to Supreme Court Rule 37.3.

courts, including full and fair compensation to redress harms suffered. Many of our member organizations may be negatively affected by the Court's decision in this case. These organizations provide legal representation to a wide variety of clients, including employees subject to mandatory arbitration clauses.

The Asian American Justice Center is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education. AAJC and its affiliates have a long-standing interest in employment discrimination issues that have an impact on the Asian American community, and this interest has resulted in AAJC's participation in a number of amicus briefs before the courts.

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA provides assistance and support to lawyers in protecting the rights of employees against the greater resources of their employers and the defense bar. NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys

committed to working for those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. As part of its advocacy efforts, NELA has filed dozens of *amicus curiae* briefs before this Court and the federal appellate courts regarding the proper interpretation and application of Title VII and other anti-discrimination statutes to ensure that the goals of those statutes are fully realized. We have endorsed the use of class actions as an important tool for vindicating civil rights, whether in a court or through arbitration, so long as arbitration is knowingly and voluntarily agreed to between the parties after disputes arise.

The National Partnership for Women & Families is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, access to quality health care, and policies that help women and men meet the dual demands of work and family. The National Partnership has devoted significant resources to combating sex, race, age, and other forms of invidious workplace discrimination and has filed numerous briefs amicus curiae in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of protected individuals in employment.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex

discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace by supporting the full enforcement of anti-discrimination laws, including Title VII of the Civil Rights Act of 1964 and other laws that protect employees. NWLC has prepared or participated in numerous amicus briefs filed with the Supreme Court and the Courts of Appeals in employment discrimination cases.

SUMMARY OF ARGUMENT

The arbitration panel's decision that the parties' arbitration clause permits class arbitration should be upheld. The parties, who are both companies in an equal bargaining position, expressly agreed that the panel would decide the procedural issue of whether the parties' agreements permit class arbitration. In carrying out that mandate, the Second Circuit appropriately found that the arbitration panel did not act in manifest disregard of the law and did not exceed its authority.

Petitioners' argument that the Federal Arbitration Act ("FAA") forbids arbitration of class claims where the arbitration agreement is silent has no basis in the text or legislative intent of the statute. The Second Circuit applied the deference required by the FAA and upheld the arbitration panel's decision. The decision below therefore comports with the intent of the FAA and should be upheld.

The Supreme Court has previously determined that employees can be bound to mandatory arbitration clauses as a condition of employment. *Circuit City v. Adams*, 532 U.S. 105 (2001). Given this precedent, a rule prohibiting class arbitration based on contractual silence would have a detrimental impact on the ability of victims of civil rights violations to have their substantive rights vindicated. If employees who suffer discrimination are required to arbitrate their claims, they should not be deprived of the tool of class arbitration to seek appropriate relief for widespread discrimination.

Without the ability to bring class cases in arbitration, some employees could not prove a pattern of discrimination that could well be critical to their ability to prevail. Additionally, in the absence of class treatment, broad injunctive relief necessary to eradicate discrimination would not be available to employees. For both reasons, a ruling that prevents class arbitration when arbitration is required would frustrate the goal of ending discrimination in the workplace—a goal made clear by Congress when it enacted Title VII of the 1964 Civil Rights Act and other laws intended to eliminate discrimination.

ARGUMENT

I. The Second Circuit Correctly Held that the Arbitrators Neither Acted in Manifest Disregard of the Law Nor Exceeded Their Authority.

This case involves a straightforward application of the Federal Arbitration Act (FAA). 9 U.S.C. § 1 *et seq.* Under the FAA, the decision of an arbitrator is given great deference. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509-510 (2001) (per curiam). This deference is detailed in Section 10 of the FAA, which lists a limited number of circumstances in which an arbitrator's decision may be vacated by a federal court. 9 U.S.C. § 10. In this case, the arbitration panel's decision that class arbitration is available is entitled to the deference afforded by the FAA.

Here, both parties agreed that an arbitration panel would decide whether class arbitration was available under their contract, which remained silent on the matter. Pet. Br. at 7-8. This question of whether class arbitration is available is a procedural matter properly decided by an arbitrator. *Green Tree Fin. v. Bazzle*, 539 U.S. 444, 451-53 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002). Thus, the Second Circuit reviewed the arbitration panel's finding under the deferential standard of Section 10 of the FAA. *Stolt-Nielsen v. Animalfeeds*, 548 F.3d 85, 97-101 (2d Cir. 2008). Under that standard, the court correctly held that the panel's decision was not in "manifest disregard" of the law. *Id.* The court also correctly found that the arbitration panel did not violate Section 10 of the FAA by exceeding its authority. *Id.* at 101.

Petitioners ask the Court to create a new, preemptive rule of contract construction, barring class arbitration unless explicitly commanded by the written instrument. Pet. Br. at 15-19. This rule lacks any basis in the FAA or the Court's jurisprudence and should be rejected. It also reverses a basic contract-interpretation rule that waivers must be knowing and voluntary.[2]

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[2] "Waiver" may be defined as "the voluntary relinquishment of a known right." Restatement (Second) of Contracts § 84 cmt. b (1981); "The party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it." Black's Law Dictionary 1611 (8th ed. 2004).

Petitioners argue that they never agreed to class arbitration. Pet. Br. at 15-19. However, Petitioners are sophisticated corporations well-versed in arbitration contracts. Pet. Br. at 14. Both parties agreed to have an arbitration panel decide whether class arbitration is available under their prior contract. *Id.* at 7. Under Section 10 of the FAA, both parties must be held to the arbitration panel's decision.

Petitioners cite to Section 4 of the FAA, which states that federal courts "shall make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement*" if one party refuses to submit to arbitration. *Id.* at 15; 9 U.S.C. § 4 (emphasis added). Here, the agreement is silent. *Id.* at 21. However, the parties expressly agreed that the panel would decide the procedural issue of whether the parties' agreements permit class arbitration. The FAA merely states that federal courts shall compel arbitration "in accordance with the terms of the agreement." 9 U.S.C. § 4. The FAA does not dictate a rule for filling in missing terms about the scope or process of arbitration.

The FAA does determine the outcome of this case, however. Here, after the Second Circuit compelled arbitration at the request of the Petitioners, the parties entered into another agreement. Pet. Br. at 6-7. This later agreement stated, among other things, that the arbitrators "shall follow and be bound by Rules 3 through 7 of the American Arbitration Association's Supplementary Rules for Class Arbitrations (as

effective Oct. 8, 2003)." *Stolt-Nielsen*, 548 F.3d at 88. Rule 3 provides that an arbitrator shall "determine as a threshold matter, . . . whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." Pet. Br. at 7. Thus, although the original arbitration clause is silent on whether class arbitration is available, the subsequent agreement reached by the parties submitted that very question to an arbitration panel. *Id.* The panel's decision on the matter must be granted deference under Section 10 of the FAA and thus, the Second Circuit's decision must be upheld.

Petitioners attempt to argue that class arbitration is being imposed upon them, but the Petitioners agreed to submit to class arbitration if the arbitration panel found that it was available. *Id.* at 7, 15-19. Petitioners must not be allowed to avoid the decision of the arbitration panel simply because they lost. The FAA does not contemplate that outcome. *See* 9 U.S.C. § 10. Section 10 of the FAA lists a limited number of circumstances when an arbitrator's decision may be vacated by a federal court. *Id.* As the Second Circuit correctly found, none of these circumstances apply here and the arbitration panel's decision must be upheld.

II. Class Arbitration is Consistent with the Text of the Federal Arbitration Act and Advances the Legislative Intent.

The FAA contains no language prohibiting class arbitration when the parties' agreement is

silent regarding the availability of class arbitration.[3] In fact, class arbitration is consistent with the statutory language and legislative intent of the FAA. An arbitration panel, acting pursuant to an undisputed agreement between the parties, found that class arbitration is available. Pet. Br. at 8-9. Under Section 10 of the FAA, that decision is due deference by the courts. Because none of the enumerated circumstances in Section 10 of the FAA apply here, the Court should affirm the Second Circuit's decision.

The Supreme Court has not used silence as a basis upon which to incorporate additional terms into an existing agreement.[4] Therefore, the silence

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[3] Congress wrote no exclusion of class treatment into the FAA, even though class actions existed at the time the FAA was enacted. Chafee, Some Problems of Equity (1950) at 220–42; 1 Street, Federal Equity Practice (1909) § 552; Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 Mich. L. Rev. 878 (1932); Blume, *Jurisdictional Amount in Representative Suits*, 15 Minn. L. Rev. 501 (1931); Yeazell, *From Group Litigation to Class Action: Part II: Interest, Class, and Representation*, 27 UCLA L. Rev. 1067 (1980); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 874, 928–41 (1958); Note, *Action Under the Codes Against Representative Defendants*, 36 Harv. L. Rev. 89 (1922); Wheaton, *Representative Suits Involving Numerous Litigants*, 19 Cornell L.Q. 339 (1934); Gordon, *The Common Question Class Suit Under the Federal Rules and in Illinois*, 42 Ill. L. Rev. 518 (1947). There is no basis for any contention that Congress was unaware of the possibility of class treatment, or intended sub silentio to establish any special rule of the type for which petitioner advocates.

[4] The Court has particularly been cautious when an arbitration agreement is silent on a key term. *See, e.g., EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (refusing to read into

in this agreement between the parties should not be construed by this Court to include an additional term barring class arbitration. The parties did not bargain on this issue and the Respondent did not waive the right to proceed as part of a class. This result is also consonant with basic contract law requiring a knowing and voluntary waiver of rights.

Petitioners claim that they would not have agreed to arbitration if they had known that "more than $6.5 billion" could be at stake in a single arbitration. Pet. Br. at 28-29. Petitioners' concern about the potential magnitude of the remedy to rectify a violation of the law cannot provide a legitimate basis to deny class treatment. Furthermore, large businesses of this size can face considerable liability even outside of the context of a class claim.

The fact that Petitioners' violation of the law could result in a large award to the class cannot justify a rule against class treatment. In some cases, especially where the parties have equal bargaining power, class treatment can benefit both parties. Class treatment can save attorneys' fees and resources that would otherwise be squandered in prosecuting and defending numerous individual arbitrations over the same issue. Further, resolution of a class action in a defendant's favor brings global closure to a disputed issue. *See Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993)

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silent agreement a term precluding administrative relief of civil rights claim); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90–91 (2000) (declining to read into silence a term on the division of forum fees).

("Findings in a common issues trial on even a few of the eight identified questions may eventually save considerable time and judicial resources. Significant economies may be achieved by relieving [defendants] of the need to prove [their case] over and over...."); *Jenkins v. Raymark Indus.*, 782 F.2d 468, 473 (5th Cir. 1986) ("To the extent defendants win, the elimination of issues and docket will mean a far greater saving of judicial resources.").

III. The Retention of Class Treatment Is Necessary to Preserve Certain Statutorily-Protected Civil Rights.

The Supreme Court has held that employees can be bound to pre-dispute mandatory arbitration clauses. *Circuit City v. Adams*, 532 U.S. 105 (2001). Because employees may be forced into arbitration, as a matter of important public policy, it is critical to allow employees in the arbitral forum to bring these claims collectively as a class in order to further the legislative intent of eradicating systemic discrimination.

A. In Pattern-and-Practice Cases, Class Litigation Is Essential to the Enforcement of Civil Rights Laws.

Challenging systemic workplace discrimination often requires the class-action vehicle. In fact, the origins of Federal Rule of Civil Procedure 23 are steeped in a civil rights tradition. The provision of the rule that allows for broad injunctive relief to an entire class was designed by the Rules Committee to assist the efforts to eradicate systemic

discrimination. *See* Fed. R. Civ. P. 23 Advisory Comm. Notes, 1966 Amends., Subdiv. (b)(2) (stating that the primary cases that fall within this Rule are "various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration"). Since the passage of Title VII of the Civil Rights Act of 1964, the class action vehicle has been recognized as an important tool to implement the Congressional commitment to ensuring equal opportunity in the workplace.[5] The Equal Employment Opportunity Act of 1972 included provisions allowing charges to the EEOC to be filed "by or on behalf of a person claiming to be aggrieved."[6] The Senate Committee explicitly endorsed this provision by stating:

> This section is not intended in any way to restrict the filing of class complaints. The committee agrees with the courts that Title VII actions are by their very nature class complaints, and that any restriction on such actions would greatly undermine the

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[5] *See East Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) ("We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs."). *See also* George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV 688, 688, 692 (1979-80); Nantiya Ruan, *Bringing Sense to Incentives: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions*, 10 EMP. RTS. & EMP. POL'Y J. 395, 400-01 (2006).

[6] S. Rep. No. 92-2525 § 5 (1971), *pertinent portion reprinted in* SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 377 (1972).

effectiveness of Title VII.[7]

As a matter of important public policy, if employees are not permitted to bring their claims before a court, they should be able to access a class remedy in the arbitration forum, so as to further the legislative intent of eradicating systemic discrimination. Class treatment enables plaintiffs to obtain the evidence necessary to establish or rebut a prima facie case of adverse impact discrimination or intentional "pattern and practice" disparate treatment going beyond the isolated facts particular to an individual claim.[8] Class evidence enables plaintiffs to use the types and scale of proof necessary to show such patterns and to establish a structure by which victims can be identified and obtain relief.

The discovery necessary to prove a company-wide disparate impact or pattern of discrimination is not generally available to individual litigants.[9]

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[7] S. Rep. No. 92-415 § 5, at 27 (1971), *reprinted in* SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 414 (1972).

[8] *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 n. 20 (1977); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08, (1977) (noting that "statistics can be an important source of proof in employment discrimination cases"); *E.E.O.C. v. Chi. Miniature Lamp Works*, 947 F.2d 292, 299 (7th Cir. 1991) ("Statistical evidence of disparities between minority representation in an employer's work force and minority representation in the community from which employees are hired can prove disparate treatment in a pattern and practice case.").

[9] *See, e.g., Adreani v. First Colonial Bankshares Corp.*, 154 F.3d 389, 400 (7th Cir. 1998) (statistical evidence concerning discharged employees generally not relevant in analysis of

Increased discovery is generally allowed in class arbitration because of the claims and complexity of such cases. This additional discovery is often necessary for plaintiffs to make the statistical and other showings that are critical to proving broad patterns and company-wide policies that impact groups of employees and cause unlawful discrimination.[10]

Obtaining a just outcome can depend entirely on proof of a discriminatory pattern. For this reason, the Court has identified pattern-and-practice cases as having unique methods of proof affecting all persons subject to the challenged practice. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 n. 20 (1977) ("Since the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation . . . . In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved."). Thus, statistical and other evidence is available to prove such patterns of discrimination.

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reasons for firing particular plaintiff); *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 792 (8th Cir. 1997) (trial court did not abuse discretion in limiting employee's request for information because companywide statistics are usually not helpful in establishing pretext).

[10] *E.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (complaining party makes out a prima facie case of adverse impact by showing significant racial disparities between selected applicants and applicant pool); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. at 339 ("[s]tatistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue.") (internal quotation omitted) (citing *Mayor of Phil. v. Educ. Equal. League*, 415 U.S. 605, 620 (1974)).

Once such a pattern is established, it creates a rebuttable presumption that each class member was victimized by the discrimination, shifting to defendants the burden of persuasion to establish the contrary.[11]

Lastly, the injunctive relief necessary to eradicate a pattern or practice of discrimination is often unavailable without class treatment. This Court has recognized that district courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discrimination effects of the past as well as bar like discrimination in the future." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)).

Moreover, even if individual plaintiffs prove pervasive discrimination, the absence of class certification jeopardizes the availability of systemic injunctions that prevent future wrongs. In individual actions, many courts have held that broad injunctive relief is prohibited when it is deemed to exceed what is needed to give individual relief to the named plaintiffs.[12]

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[11] *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 875-76 (1984); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. at 361-62; *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772-73 (1976); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 168 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1106 (10th Cir. 2001) ("significant advantage" in ADEA collective action), *cert. denied*, 536 U.S. 934 (2002).

[12] *E.g., Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 766-67 (4th Cir. 1998), *vacated*

If arbitration clauses that are silent on the subject of class arbitration are construed to prohibit class arbitration, then countless employees will be rendered powerless to challenge pattern-and-practice discrimination. This result would contravene public policy and Congress's intent to provide relief for such discrimination. Therefore, class arbitration must remain available when the arbitration clause is silent on the matter, and plaintiffs are precluded by an arbitration clause from proceeding on a class basis in court.

B. Some Claims Are Too Small For Counsel to Litigate Economically.

Because the amount of damages at issue often precludes employees from undertaking individual litigation, some individuals would be forced to forgo redress for the violation of their rights if class treatment is unavailable. The Court has recognized the crucial function that class actions play in

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and remanded on other grounds, 527 U.S. 1031 (1999), *reaff'd, Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 437 (4th Cir.), *cert. denied*, 531 U.S. 822 (2000); *Paige v. California*, 102 F.3d 1035, 1039 (9th Cir. 1996); *Butler v. Dowd*, 979 F.2d 661, 674 (8th Cir. 1992), *cert. denied*, 508 U.S. 930 (1993); *Brown v. Trustees of Boston University*, 891 F.2d 337, 361 (1st Cir. 1989), *cert. denied*, 496 U.S. 937 (1990); *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987); *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 888 (3d Cir. 1986), *approved on rehearing*, 809 F.2d 979, 982 n.1 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1998); *Nat'l Ctr. for Immigrant Rights v. INS*, 743 F.2d 1365, 1371-72 (9th Cir. 1984), *vacated on other grounds*, 481 U.S. 1009 (1987); *Zepeda v. INS*, 753 F.2d 719, 727-29 (9th Cir. 1983); *Hollon v. Mathis Indep. Sch. Dist.*, 491 F.2d 92, 93 (5th Cir. 1974) (per curiam).

protecting individual rights, noting that "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Indeed,

> the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (citations omitted).

Injured parties are not often able to bear the significant expenses involved in challenging well-heeled defendants such as large corporations on an individual basis.[13] Without the availability of class or other collective action devices, such potential defendants would have a distinct advantage over plaintiffs.[14] Many state courts, in recognition of this

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[13] 7B WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1782 at 59 (1986).

[14] *See Amchem Prods., Inc.*, 521 U.S. at 617 (noting that "the Advisory Committee [in enacting Rule 23] had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'"). *See also* Jean Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the*

problem, have sanctioned class actions as the solution.[15]

Class Action Survive?, 42 Wm. & Mary L. Rev. 1, 9 (2000) ("The potential defendants know that because many claims are not viable if brought individually, plaintiffs will often drop or fail to initiate claims once it is clear that class relief is unavailable" (footnote omitted).

[15] *See, e.g., Leonard v. Terminix Int'l Co., L.P.*, 854 So.2d 529, 539 (Ala. 2002) ("This arbitration agreement is unconscionable because it is a contract of adhesion that restricts the Leonards to a forum where the expense of pursuing their claim far exceeds the amount in controversy. The arbitration agreement achieves this result by foreclosing the Leonards from an attempt to seek practical redress through a class action and restricting them to a disproportionately expensive individual arbitration."); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 278-79 (W. Va 2002) ("Thus, in the contracts of adhesion that are so commonly involved in consumer and employment transactions, permitting the proponent of such a contract to include a provision that prevents an aggrieved party from pursuing class action relief would go a long way toward allowing those who commit illegal activity to go unpunished, undeterred, and unaccountable."), *cert. denied sub nom. Friedman's Inc. v. West Virginia*, 123 S. Ct. 695; *McDonald v. Washington*, 862 P.2d 1150, 1158 (Mont. 1993) ("The Green court also put into perspective the need for class actions and the type of case which is best litigated as a class action: Equity has long recognized that there is need for a course which would redress wrongs otherwise unremediable because the individual claims involved were too small, or the claimants too widely dispersed . . . In the instant case, the claims involved would be unremediable without class action status because most are minor in and of themselves.") (citation omitted); *In re Cadillac V8-6-4 Class Action*, 461 A.2d 736, 748 (N.J. 1983) ("Individual actions or a test case may be an inferior alternative to the class action when the economics of the situation make it impossible for the aggrieved members to vindicate their rights by separate actions.") (citation omitted); *Vasquez v. Superior Court*, 484 P.2d 964, 968 (Cal. 1971) ("Individual actions by each of the defrauded consumers is often impracticable because the

In all areas of the law, including civil rights cases, it is difficult for persons with small monetary claims to find capable counsel.[16] Employment discrimination claims are particularly at risk of going unanswered because of the difficult legal proof frameworks and the contingent nature of the litigation.[17] Even with fee-shifting statutes, individual cases remain economically less desirable

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amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct."); *Daar v. Yellow Cab Co.*, 433 P.2d 732, 746 (Cal. 1967) ("It is more likely that, absent a class suit, defendant will retain the benefits from its alleged wrongs.").

[16] *See, e.g., USA Check Cashers of Little Rock, Inc. v. Island*, 76 S.W.3d 243, 248-49 (Ark. 2002)(class action superior when "potential recovery to each member of class expected to be relatively small and would not justify contingency fee cases nor cases in which attorneys charge on an hourly basis"). *See also* Julia Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 Hastings L.J. 197, 236 (1997) (noting that "[d]espite the existence of individual attorneys whose choice of cases is driven more by ideological commitment than money, the plaintiffs' damages were a factor many survey participants viewed as extremely important in determining what cases they wanted to accept") (footnote omitted).

[17] *See* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEG. STUD. 429, 429 (2004) (noting based on empirical study that in employment discrimination cases, "relatively often, the numerous plaintiffs must pursue their claims all the way through trial . . . ; at both pretrial and trial these plaintiffs lose disproportionately often, in all the various types of employment discrimination cases; and employment discrimination litigants appeal more often than other litigants, with the defendants doing far better on those appeals than the plaintiffs"); Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813 (2004).

for attorneys than cases in which substantial recoveries or broad injunctive relief are at stake. Courts, moreover, routinely consider the complexity of a case when deciding attorneys' fees petitions and will reduce fee awards for cases they consider to be simple or straightforward,[18] supporting the paradigm by which attorneys are discouraged from representing small individual claims, making the availability of class treatment all the more important.

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[18] *See, e.g., Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 184 (2d Cir. 2007) (in determining the "reasonable hourly rate" used to calculated the "lodestar," a district court should consider, among other factors, "the complexity and difficulty of the case" and "whether an attorney might have initially acted *pro bono* (such that a client might be aware that the attorney expected low or non-existent remuneration)"); *Montcalm Publ'g Corp. v. Commonwealth of Virginia*, 199 F.3d 168, 174 (4th Cir. 1999) (upholding district court's reduction of attorneys' fees for appeal of a "novel but uncomplicated issue" that had been briefed and researched during the lower court phase); *Pizzolato v. Safeco Ins. Co. of America*, No. 08 Civ. 353, 2008 U.S. Dist. LEXIS 88603, at *6 (M.D. La. Nov. 3, 2008) (reducing attorney's hourly rate "to be more indicative of this uncomplicated matter"); *Stone v. Deagle*, No. 05 Civ. 1438, 2007 U.S. Dist. LEXIS 88235, at *7 (D. Colo. Nov. 19, 2007) (reducing attorney's hourly rate despite extensive experience because of matter's "uncomplicated" nature); *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. 5*, No. 8:04-1866, 2007 U.S. Dist. LEXIS 32495, at **8-9 (D.S.C. May 2, 2007) (reducing hours in First Amendment case because the uncomplicated nature of the law and discovery in case did not warrant high number of hours spent).

C. Employers Should Not Be Permitted to Draft Vague Arbitration Clauses that Permit Civil Rights Violations to Go Unremedied.

Accordingly, class treatment can be critical to the vindication of civil rights. When class treatment is important to the vindication of a claim, a company-drafted arbitration clause should not trump Congress's clear intent in authorizing class actions. The arbitral framework must preserve the opportunity for consideration of class certification under the standards used by the courts.

Job applicants and employees rarely, if ever, negotiate over the terms of pre-dispute arbitration clauses.[19] Arbitration clauses are often buried in the boilerplate of job applications or in employee handbooks,[20] and job applicants and employees are

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[19] Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISPUTE RESOLUTION JOURNAL (May/July 2003), at 2, *available at* http://www.adr.org/si.asp?id=2532 ("Signing a mandatory arbitration clause is a job requirement – generally included among the papers given to an employee to sign when he or she starts a new job").

[20] *See Id.*; Bonnie Barnish, *Signing an Arbitration Agreement With Your Employer*, http://employment.findlaw.com/employment/employment-employee-hiring/signing-arbitration-agreement.html (last visited Oct. 24, 2009) ("Employees often sign arbitration agreements unintentionally. How can this happen? Some employers bog down new employees with tons of paperwork to fill out on their first day, and some employees, in turn, sign documents without reading them. Although many employers are straightforward and present the arbitration agreement to employees openly in a separate contract, others bury arbitration agreements in other documents, such as an employment contract, a hiring letter, or an employee

generally required to sign the documents containing employer-drafted arbitration clauses as a condition of employment.[21] One recent study found that, despite the prevalence of binding arbitration clauses in employment and consumer agreements, most Americans fail to take note of such clauses.[22] Further, approximately seventy-five percent of Americans mistakenly believe that they can sue their employers if they are seriously harmed or have a major dispute, even if they are subject to a binding arbitration clause.[23] If the Court holds that employers can bind employees to the arbitral forum while eliminating, *sub silentio,* the potential for class arbitration, the rights of many employees to pursue pattern-and-practice claims of discrimination would be eroded even further.

To be sure, the EEOC cannot fill the void if class arbitration is prohibited whenever arbitration

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handbook.").

[21] *See* Barnish, *supra* note 20 ("If your employer asks you to sign an arbitration agreement, you can refuse, but you may be putting your job in jeopardy if you do so. Usually, an employer can rescind an employment offer if a prospective employee refuses to sign the arbitration agreement. And an employer can fire an at-will employee who refuses to sign one. Therefore, declining to sign the agreement could jeopardize your job"); Jennifer Brown Shaw, Shawvalenza.com, *A Checklist for Preventing Human Resources Problems*, http://shawvalenza.com/publications.php?=36 (last visited Oct. 24, 2009) ("many employers require all employees, as a condition of hire or continued employment, to sign mandatory arbitration agreements.").

[22] Memo on 2009 Study of Public Attitudes on Forced Arbitration,http://www.justice.org/resources/Forced_Arbitration_Study_Memo_0409.pdf (last visited Oct. 24, 2009).

[23] *Id.*

agreements are silent. As the Court recognized in *Waffle House*, the EEOC has never been able to bring more than a small fraction of the enforcement cases filed annually,[24] and the primary burden of enforcing Title VII has always rested on private plaintiffs.[25]

CONCLUSION

For the above reasons, the *amici* respectfully suggest that the judgment of the Second Circuit should be AFFIRMED.

Respectfully submitted,

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[24] *EEOC v. Waffle House*, 534 U.S. at 290.

[25] See Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives From an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 358 (1988).

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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SEP

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In the
Supreme Court of the United States

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; Jo TANKERS B.V.; Jo TANKERS, INC.; TOKYO MARINE Co., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Petitioners.[1]

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving the Federal Arbitration Act and contractual arbitration in general, including *DHL Express (USA), Inc. v. Ontiveros*, 129 S. Ct. 1048 (2009); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008); *Preston v. Ferrer*, 128 S. Ct. 978 (2008); and *Cingular Wireless, LLC v. Mendoza*, 547 U.S. 1188 (2006). PLF believes its public policy experience will assist this Court in its consideration of the merits of this case.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The purpose behind the Federal Arbitration Act is to preserve and promote the right to contractual choice. It is not to impose on contracting parties a means of dispute resolution unrelated to, or possibly contrary to, their actual preferences. While arbitration is generally thought to be more "economically efficient"—meaning that it costs less time and money than litigation—this is not why arbitration contracts ought to be enforced; rather, like all mutually agreed-upon contracts, arbitration agreements should be enforced because they represent the bargained-for meeting of the minds between the parties. Such contracts are the product of the parties' own assessments of their costs and benefits, and as no third party is in a better position to decide whether the benefits outweigh the costs, the parties' own judgment deserves respect.

Given the FAA's overriding purpose of protecting freedom of choice, courts should not construe arbitration agreements in a broad manner that subjects parties to *class* arbitration when no such meeting of the minds is evident in their agreement. To do so would be to impose a dispute resolution mechanism by coercion rather than choice, which would contradict the basic principles of arbitration itself.

Moreover, imposing class arbitration would also threaten the security of other important constitutional rights. A knowing and voluntary agreement to arbitrate waives certain constitutional rights that would apply in litigation. Thus, for a court to infer an intent to arbitrate from equivocal evidence would risk imposing a waiver of constitutional rights where the party did not so intend. This Court should not

presume a waiver of constitutional rights in the absence of an unmistakable attempt to waive them. The judiciary should "not stretch the language" of an arbitration agreement when the parties have "not included a provision [they] easily might have [included]." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959).

ARGUMENT

I

THE RIGHT TO FREEDOM OF CONTRACT—INCLUDING CONTRACTS TO ARBITRATE—IS A MATTER OF INDIVIDUAL FREEDOM, NOT DISCRETIONARY SOCIAL POLICY

The liberty explicitly guaranteed by the Constitution includes the freedom of individuals or groups to decide how to use their property, labor, capital, and other rights commonly subject to exchange. The right of people, either individually or in concert, to dispose of their time, energy, liberty, or possessions is a fundamental element of freedom. *See, e.g.*, John Locke, *Second Treatise of Civil Government* § 57 (Peter Laslett ed., rev. ed. 1963) (1690) (freedom means a person's "liberty to dispose and order freely as he lists his person, actions, possessions, and his whole property within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own."). This means that people must be free to formulate agreements and exchanges, including agreements that third parties might regard as unwise or undesirable.

Freedom of exchange has many beneficial economic and social consequences. In particular, it

allows people to apply resources to the most efficient uses. Richard Posner, *Economic Analysis of the Law* 10 (4th ed. 1992). Individuals and firms can exchange their possessions or efforts for things that they value more, thereby maximizing the utility each individual enjoys. *Id.* at 11 ("By a process of voluntary exchange, resources, are shifted to those uses in which the value to consumers, as measured by their willingness to pay, is highest."). Free exchange therefore leads to greater economic efficiency. *See also* Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. Rev. 81, 104-05 (1992) ("Efficiency is furthered by agreements to exchange items because each party will receive a more useful item than it surrenders.").

But the Constitution and laws—including the FAA—protect liberty not merely in pursuit of economic efficiency, but because those choices are inherently worthy of respect. As this Court observed in a different context, "whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice." *Faretta v. California*, 422 U.S. 806, 833-44 (1975). The exercise of rightful freedom—which in Thomas Jefferson's words means "unobstructed action according to our will within limits drawn around us by the equal rights of others," Letter to Isaac H. Tiffany, April 4, 1819, *in Jefferson: Political Writings* 224 (Joyce Appleby ed., 1999)—represents the individual's decision of how to employ her faculties in pursuit of her own ends. The founders referred to such decision-making as "the pursuit of happiness." Declaration of Independence, 1 Stat. 1, 1 (1776).

The right of each person peacefully to pursue her own happiness is justified both by the worthiness of

the goal itself and by the fact that outside observers are virtually never in a position to know what ends another person ought to pursue. Outsiders have very limited knowledge of a person's circumstances, desires, and abilities; they are also subject to different incentives and desires than the contracting parties themselves. Given the power to control or limit the freedom of contracting parties, outsiders will typically make erroneous assessments of the parties' priorities or of the appropriateness of a particular means to the ends that the parties seek. Also, outsiders will often exploit such power to serve their own interests at the expense of the contracting parties. Thus outsiders cannot be trusted with the authority to control the choices that contracting parties might make, even where doing so might appear to lead to more "efficient" results, or results that outsiders consider more desirable.

In short, the right to make economic choices, like other rights, is protected not because it leads to broader policy goals like wealth maximization or "economic efficiency," but because that right preserves individual autonomy and restricts the improper interference of outsiders. This Court has often recognized that liberty is protected even where its social benefits are minimal or its consequences undesirable. For example, the First Amendment protects free speech even though some expression might be offensive to others. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 420 (1989) (flag burning); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (erotic dancing). This Court has also protected other aspects of individual freedom because they are central to individual autonomy, and not because they serve some broader scheme of social welfare. *See, e.g., Faretta*,

422 U.S. at 834 ("although [a criminal defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring))). As Justice Blackmun wrote (in a dissenting opinion that was later vindicated) the Constitution protects individual rights "not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life." *Bowers v. Hardwick*, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting).

This Court has recognized that the freedom to make and enforce contracts is a fundamental element of free choice and ought to be protected for that reason. *See, e.g., Advance-Rumely Thresher Co., Inc. v. Jackson*, 287 U.S. 283, 288 (1932) ("[F]reedom of contract is the general rule and . . . [t]he exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."); *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931) ("The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts."). Other courts have agreed. *See, e.g., Commodity Futures Trading Comm'n v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1333 (11th Cir. 2002) ("The law vigorously protects the right of private individuals to exercise free choice in the marketplace."); *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 460 (3d Cir. 2003) (" 'This cause of action—that contractual promises can be enforced in the courts—pre-dates Magna Carta. It is the very bedrock of our notion of

individual autonomy and property rights.'" (quoting *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49 (D. Mass. 1997))). The freedom to formulate economic agreements and exchanges is not a discretionary social policy imposed by government to serve the state's purposes, but an element of that freedom of choice to which every individual is entitled by right.

The right to choose how to resolve disputes is also an aspect of this freedom of choice, and often one that implicates extremely important personal values. For example, many people choose to have disputes arbitrated by religious leaders, *see, e.g.*, *Jabri v. Qaddura*, 108 S.W.3d 404 (Tex. App. 2003) (compelling arbitration by Islamic authorities); *Elmora Hebrew Ctr., Inc. v. Fishman*, 570 A.2d 1297 (N.J. Super. Ct. App. Div. 1990), *aff'd*, 593 A.2d 725 (N.J. 1991) (enforcing decision of Jewish arbitrators). While some might see commercial arbitration contracts between sophisticated businesses as impersonal, routine affairs, the reality is that decisions regarding arbitration are often fraught with judgments about essential individual values. Courts should respect contractual choices, including arbitration agreements, not simply to serve public policy goals involving speedy dispute resolution, but because contractual freedom of choice is worthy of protection and enforcement.

II

CONSIDERATIONS OF ECONOMIC EFFICIENCY DO NOT WARRANT IMPOSING ARBITRATION ON PARTIES AGAINST THEIR WILL

Participants in arbitration generally consider the procedure more economically efficient than litigation

because it costs less time and money. *See, e.g.*, Thomas S. Meriwether, *Limiting Judicial Review of Arbitral Awards Under the Federal Arbitration Act: Striking the Right Balance*, 44 Hous. L. Rev. 739, 758 (2007) ("Parties opt for arbitration in lieu of traditional litigation in large part because arbitration offers a quicker and less expensive avenue for dispute resolution."). This has led some courts to conclude that judges should presume in favor of arbitration, even where the parties may not have sought it. *See, e.g.*, *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966, 975 (2d Cir. 1975), *overruled by United Kingdom v. Boeing Co.*, 998 F.2d 68, 71 (2d Cir. 1993). But this Court has observed that freedom of choice, and not efficiency concerns, animates the Federal Arbitration Act. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985) (FAA was designed "first and foremost . . . to enforce agreements into which parties had entered, and we must not . . . allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation.").

It is illusory to regard a case like *Byrd* or the present case as a clash between efficiency and free choice. That distinction rests on an incorrect understanding of the term "economic efficiency." That term "efficiency" is meaningless when abstracted from the choices that parties freely make when weighing their options. There is no such thing as efficiency *per se*; there can only be an efficient means to accomplish some particular end with minimal waste. Yet ends are only pursued by individuals or business firms, not by society as a whole. As economist Israel Kirzner wrote,

> [s]ociety has no single mind where the goals of different individuals can be ranked on a single scale. . . . We are not invoking the notion of a society having *its* goals in any sense apart from the goals of the individuals making up the society. Efficiency for a social system means the efficiency with which it permits its individual members to achieve their several goals.

Market Theory and the Price System 35 (1963). Since "society" does not pursue any particular end, it is impossible to say whether a policy advances that end with minimal waste.[2] Thus there can be no such thing as a policy that is "socially" efficient. *See also* Frank Knight, *The Ethics of Competition* 34 (Transaction Books 1997) (1923) ("It is impossible to form any concept of 'social efficiency' in the absence of some general measure of value.").

Moreover, it is rarely if ever possible for outsiders to determine what actions are most efficient for contracting parties to take than to observe the transactions to which those parties actually agree. To second-guess their decisions would require a degree of knowledge that is almost never available to an outside observer. As economist Friedrich Hayek observed in his Nobel prize lecture:

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[2] It might be argued that there is one policy that is, in fact, "efficient" for society as a whole, as it serves the interests of all concerned: that is, the protection of individual rights. *See The Federalist No. 10*, at 80-81 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he great desideratum by which [representative] government can be rescued from . . . opprobrium" is "[t]o secure the public good and private rights against the danger of such a faction" as might "sacrifice the weaker party or an obnoxious individual.")

> Into the determination of [the terms of an exchange] . . . there will enter the effects of particular information possessed by every one of the participants in the market process—a sum of facts which in their totality cannot be known to the scientific observer, or to any other single brain. . . . [B]ecause we, the observing scientists, can thus never know all the determinants of such an order . . . we also cannot measure the deviations from that order; nor can we statistically test our theory that it is the deviations from that "equilibrium" system of prices and wages which make it impossible to sell some of the products and services at the prices at which they are offered.

The Pretense of Knowledge (1974), *reprinted in* NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS, AND THE HISTORY OF IDEAS 23, 27 (1977).

Thus there can be no such thing as "efficiency in general" or "collective" or "social" efficiency. Rather, as Nobel laureate James Buchanan writes, "voluntary exchanges among persons, within a competitive constraints structure, generate efficient resource usage, *which is determined only as the exchanges are made*." James M. Buchanan, *Rights, Efficiency, and Exchange: The Irrelevance of Transaction Cost* (1984), *reprinted in* THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY 260, 273-74 (1999) (emphasis added). Outsiders cannot gather the information necessary to know whether an economic exchange is efficient except to observe that the parties, who know their own priorities best, voluntarily adopted it. *See* Donald J. Boudreaux et al., *Talk Is Cheap: The*

Existence Value Fallacy, 29 Envtl. L. 765, 785 (1999) ("In market transactions, we can assume that all individual trades increase individual utility, because the occurrence of the trade itself suggests that the individual values the good received more highly than the good surrendered."). This is as true of arbitration as of any other contract. "For the system to work, government has to trust people, even to the extent of letting them enter 'bad' contracts. . . . The government does its best work when it sticks to furthering the competitive aspects of the system and leaves the deal-making to the parties." Scott J. Burnham, *The War Against Arbitration in Montana*, 66 Mont. L. Rev. 139, 204 (2005).

Thus the term "economic efficiency" is misused when it is applied in a way that disregards the actual decisions individuals make in pursuit of their own ends. Collective economic efficiency cannot be an end which social policy pursues; an activity is economically efficient only to individuals and only in light of their individual pursuits. Nor can economic efficiency serve as a normative guideline for shaping social policy. As economist Viktor Vanberg writes:

> In saying that market outcomes are efficient, one claims, in effect, that the processes by which they are generated are 'good,' in the sense that through their market choices the constituent individuals reveal what they consider 'good' in their own judgement. . . . There is no reference to any standard that would allow one to judge the outcome independently of the transaction itself.

Individual Choice and Institutional Constraints: The Normative Element in Classical and Contractarian

Liberalism, in RULES AND CHOICE IN ECONOMICS 210 (1994).

Since goals are inherently individualized and particular, assessments of true economic efficiency are also inherently personal. Some economists have tried to devise different definitions of economic efficiency, arguing for example that a policy is economically efficient if it aims at maximizing society's wealth. *See, e.g.*, Posner, *supra*, at 14-15. But this disregards the fact that not all economic actors seek to maximize wealth. Rather, they seek to maximize *utility*, which may or may not include considerations of monetary wealth. As economist Murray Rothbard noted, an economic actor "always chooses a bundle of *money income plus other psychic factors* and . . . will maximize his money income only if psychic factors are neutral with respect to his choices." *Man, Economy, and State* 186 (Nash Publishing 1970) (1962). Any government policy which coerces individuals against their will to do what outside observers think will maximize society's wealth will in fact deprive those individuals of utility—thus diminishing their ability to pursue their ends in the ways they consider most efficient. Such a policy would by definition be economically *inefficient*. While it may be *politically* efficient to force individuals to pursue goals that political representatives consider worthy, it is not *economically* efficient to force people to surrender their own desires.

To the degree that a policy substitutes political efficiency for economic efficiency—substitutes the goals of political leaders for the goals of those citizens who seek to pursue happiness through mutually satisfactory exchanges—that policy also substitutes other normative goals in place of allegedly neutral

economic analysis. As economist Louis De Alessi explained, "[t]he maximization of aggregate wealth implies that sources of utility not reflected in the aggregate do not matter and that changes in the wealth of individuals that do not result in a reduction of aggregate wealth also do not matter." *Efficiency Criteria for Optimal Laws: Objective Standards or Value Judgments?*, 3 Const. Pol. Econ. 321, 334-337 (1992). But prioritizing the desires of third parties above the desires of the contracting parties renders *economic* concerns superfluous. At that point, the state is simply confiscating individual freedom for its own ends, and its doing so is subject to political, rather than to economic analysis.

In short, it makes no sense to speak of a coercive policy as economically efficient. Coercive policies deprive the contracting parties of their judgment, to benefit outsiders, whose goals are thereby deemed more worthy. But if the desires of the contracting parties are to be disregarded, then the determination of whether a decision is efficient for those parties is unnecessary and senseless.

What attorney Roger L. Carter writes of coercion in mediation is equally true of any form of coercive arbitration:

> If a party is not free to make a small offer—or no offer at all—in mediation, that party has lost, rather than gained, autonomy. . . . Judges must recognize that the parties—not the court—own the dispute. . . . Any contrivance that works against this right deserves condemnation. . . . [W]e err if we see docket clearing as a primary goal of any form of

> ADR. Mediation processes should be designed to improve the quality of settlements. Any attendant increase in the quantity of settlements ought to be seen as a secondary benefit.

Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations, 2002 J. Disp. Resol. 367, 395. Prioritizing the political goal of increased *quantity* of dispute resolutions over the litigants' own interest in the *quality* of those resolutions jettisons the desires of the litigants themselves, and thus cannot qualify as *economically* efficient.

The Second Circuit's resolution of *Boeing*, 998 F.2d 68, was therefore correct and instructive here. In that case, the court overruled *Nereus*, 527 F.2d 966, which had allowed arbitration cases to be consolidated despite the failure of the parties to agree to such a procedure. The *Nereus* court held that this was justified by "the liberal purposes of the Federal Arbitration Act," which "require that [it] be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings." *Id.* at 975.

The *Nereus* court relied on the earlier decision of *Robert Lawrence Co., Inc. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 410 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960), which held that the FAA required courts to "promot[e] arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars." But in *Byrd*, 470 U.S. at 220, decided in 1985, this Court rejected the proposition that the FAA's overriding goal is to promote speedy resolutions of disputes; rather, *Byrd*

made clear that the goal of the FAA is "to enforce agreements into which the parties had entered," whether or not those agreements promote speedy resolution. Thus, in *Boeing*, the Second Circuit overruled *Nereus*, noting that "the FAA was intended merely to assure the enforcement of privately negotiated arbitration agreements, *despite* possible inefficiencies created by such enforcement." 998 F.2d at 72. While the Second Circuit may consider this outcome inefficient, that outcome is in reality efficient, if it enforces the actual desires of the parties. And it is the desires of the parties, not concerns over economic efficiency, that dictate the policy of the Federal Arbitration Act—and of enforcing any other kind of contract.[3]

This Court has repeatedly observed that the FAA's policy favoring arbitration does not operate without regard to the wishes of contracting parties. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *accord, Volt Info. Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) ("Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."). This is correct, but it should not be seen as a choice between competing values of autonomy or economic efficiency. In fact, those values necessarily harmonize; both are best pursued by respecting the right of individuals and

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[3] In *Byrd*, this Court held that parties to an arbitration agreement could not force other parties to arbitrate issues not contemplated by the agreement even if those issues were pendent. 470 U.S. at 217. The same principle bars coercing pendent *parties* into an arbitration against their will, or consolidating potential or existing disputes against the parties' will. *Boeing*, 998 F.2d at 74.

firms to make transactions as they see fit, and holding them to the contracts that they sign.

III

IMPOSING CLASS ARBITRATION ON PARTIES WITHOUT THEIR CONSENT WOULD HAVE TROUBLING POLICY CONSEQUENCES

Class arbitration is a relatively new innovation, the rules for which remain vague; imposing it on parties without their actual consent would raise serious public policy objections. For example, many commentators have questioned the due process implications of binding non-disputants to judgments in class arbitrations. *See, e.g.*, Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 Wm. & Mary L. Rev. 1711, 1722 (2006) ("An arbitral award generally cannot bind a nonparty to the arbitration contract; however, the question of whether nonparticipatory class members' rights may be foreclosed in a private class arbitration is not entirely clear.").

The central conflict here is the contrast between *individualized* determinations of the rights of parties who have signed an arbitration agreement and the mass resolution of collective injuries by courts. Parties to an arbitration contract have agreed to a process that is inherently individualistic; under the plain language of the arbitration agreement in this case, for instance, each party has a right to an individualized review of the disputes that arise. *See* Brief of the Ass'n of Ship Brokers & Agents (U.S.A.), Inc. as Amicus Curiae in Support of Petitioners at 6, *Stolt-Nielsen S.A., et al. v. AnimalFeeds Int'l Corp.*, No. 08-1198, 2009

WL 1133152 (U.S. filed Apr. 23, 2009) (the agreement speaks of "*the* owner" and "*the* charterer"). But class-based resolutions are not individualized; they resolve mass conflicts which are deemed similar enough to warrant treatment all as one. The parties therefore do not litigate the particular merits of their different circumstances.

In addition, each party to an arbitration has a right to participate in choosing the arbitrator—a right the Seventh Circuit calls "the cornerstone of the arbitral process." *Lefkovitz v. Wagner*, 395 F.3d 773, 780 (7th Cir. 2005). Also, in some cases, parties to an arbitration agreement are legally entitled to invalidate that agreement, based on "individualized evidence that [the party] likely will face prohibitive costs in the arbitration at issue and that it is financially incapable of meeting those costs." *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003). These factors reveal that arbitration is an essentially individualized format, in which each party has reserved an opportunity for individual determination of his or her particular injury. Class treatment would deprive the parties of this individualized treatment.[4]

Indeed, class arbitrations could deprive even non-disputants of this right, since such arbitrations are resolved through judgments that could preclude later

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[4] Even the propriety of class arbitration where the class does not meet the standards for class treatment set in Federal Rule of Civil Procedure 23 is questionable. The American Arbitration Association has formulated rules for certifying classes that parallel federal rules for class certification, but there is no legal reason that these two must be identical. If a class satisfies the Association's rules for class treatment but not federal rules, it would seem to violate due process for a court to refer the case to arbitration for class treatment. Weston, *supra*, at 1737-42.

litigation by another injured party over an injury similar to the one redressed in arbitration. A person who signs an arbitration agreement with a business, but has no dispute with the firm at the time that a class arbitration is brought against it by another signer, could find herself barred from suing later if a dispute does arise which is similar to the dispute resolved in arbitration. This would deprive her entirely of the opportunity for individualized resolution to which she has a contractual right. Procedural rules applicable in class *litigation* typically require the parties to take steps to notify all potential class members of the proceedings and allow them to participate. Fed. R. Civ. P. 23. But what sort of notice requirements apply to class *arbitration* is unresolved. California courts require judges to supervise class arbitrations to "safeguard the rights of absent class members to adequate representation and in the event of dismissal or settlement." *Izzi v. Mesquite Country Club*, 186 Cal. App. 3d 1309, 1321 (1986) (quoting *East San Bernardino County Water Dist. v. City of San Bernardino*, 33 Cal. App. 3d 942, 950 (1973)). But in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453-54 (2003), this Court limited the judge's role solely to determining arbitrability, not supervising the arbitration to ensure that it complies with due process rules. Thus it is unclear whether non-disputants who have signed arbitration agreements are entitled to the same protections with respect to class arbitrations that they receive vis-á-vis class litigation. *See further* Carole J. Buckner, *Due Process in Class Arbitration*, 58 Fla. L. Rev. 185, 251-52 (2006) ("[A]rbitration providers' rules also fail to require explicitly the arbitrator to protect or safeguard the rights of absent

parties throughout the class action proceeding as explicitly required in class action litigation.").

Perhaps the most troubling problem with inferring consent from a silent arbitration agreement is that such an inference might deprive parties of constitutional rights by presumption. This Court has repeatedly held that it will not lightly presume in favor of a waiver of constitutional rights. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) ("'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights." (quoting *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393 (1937))). Yet arbitration agreements do waive certain constitutional protections. *See, e.g., Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995) (due process did not apply because arbitration is not state action). Thus, inferring that a party is willing to participate in class arbitration when the arbitration agreement is silent on that matter might operate to waive constitutional procedural rights, both of the defendant and those nondisputants who have also signed the arbitration agreement. This Court should resist adopting a rule that could lead to such dangerous consequences.

The Federal Arbitration Act was designed to expand and enforce freedom of choice. Adopting a rule which might imply the waiver of important constitutional rights would undermine the purpose of the Act by replacing informed consent with implication and coercion. It would replace a regime of free decisionmaking with a rule that enforces "consent" where none actually exists. To defend freedom of choice and to put into effect the actual decisions of

contracting parties, this Court should refuse to infer a willingness to participate in class arbitration from a silent arbitration agreement.

CONCLUSION

The authority of federal courts to compel arbitration is justified by the FAA's overriding policy of protecting the freedom of choice of contracting parties, not by concerns with "efficiency." Indeed, to compel a party to submit to arbitration against his or her will would distort the actual meaning of economic efficiency. This Court should avoid adopting a rule which might lead to the implied waiver of constitutional rights to fair dispute resolution procedures. The decision of the court of appeals should be *affirmed*.

DATED: September, 2009.

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AMICUS CURIAE BRIEF

No. 08-1198

IN THE

Supreme Court of the United States

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

This case presents two threshold questions concerning whether the district court had the authority to entertain Stolt-Nielsen's petition to vacate the arbitration panel's preliminary clause-construction ruling:

1. Is the case ripe for review?
2. Is the clause-construction ruling an "award" subject to vacatur under the Federal Arbitration Act?

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a national consumer advocacy organization founded in 1971, appears on behalf of its members before Congress, administrative agencies, and the courts on a wide range of issues and works toward enactment and effective enforcement of laws protecting consumers, workers, and the general public.

Public Citizen supports legislative efforts to reform mandatory arbitration because forced arbitration, which has become ubiquitous in consumer transactions, deprives consumers of the chance to hold corporations accountable in court. Absent such reform, class arbitration is, in many cases, the only practical mechanism within the mandatory-arbitration regime by which aggrieved parties can realistically obtain relief. Where, as here, the scale of alleged wrongdoing is great, and the transactions complex, one-on-one arbitration may be economically impractical or, at best, inefficient. That result is even more likely in matters involving large numbers of consumer transactions, where each transaction may involve a relatively small amount of money. Accordingly, where class arbitration is unavailable, not only may resource-rich corporate defendants evade justice in the courts, they may evade justice altogether. Moreover, unwarranted and premature judicial interference in class arbitration proceedings will add to the burdens imposed on claimants seeking to enforce their legal rights using the class-action device.

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[1] Pursuant to Rule 37.6 of this Court, amicus curiae states that this brief was not written in whole or in part by counsel for a party and that no one other than amicus curiae made a monetary contribution to the preparation or submission of this brief. Letters from both parties consenting to all amicus briefs are on file with the Clerk.

STATEMENT

This matter arose in 2003 when respondent Animalfeeds, Inc., a supplier of protein and fat ingredients to animal-feed producers worldwide, claimed violations of the Sherman Act against a number of oceanic cargo shipping entities that had allegedly manipulated the global market for parcel tanker shipping services, including Stolt-Nielsen S.A. and the other petitioners (collectively, "Stolt-Nielsen").

The parties' briefs detail at length the procedural history of the case. Suffice it to say that at Stolt-Nielsen's urging, and upon order of the court of appeals,[2] Animalfeeds submitted its Sherman Act claims to binding arbitration and sought to arbitrate on a classwide basis.

At the threshold, the parties disputed whether their agreements, which did not in so many words address class proceedings, permitted class arbitration. They therefore agreed to submit that issue to the arbitration panel for decision as a prerequisite to a possible request to certify a class.

On December 20, 2005, after hearing evidence and argument, the panel issued its so-called "Partial Final Clause Construction Award," in which it determined no more than that the agreements permitted class arbitration. Stolt-Nielsen immediately filed an action in the United States District Court for the Southern District of New York seeking vacatur of the panel's ruling on clause construction under section 10(a)(4) of the Federal Arbitration Act ("FAA"). The district court vacated the panel's ruling, *Stolt-Nielsen S.A. v.*

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[2] *JLM Indus., Inc. v. Stolt-Nielsen, S.A.*, 387 F.3d 163 (2d Cir. 2004).

Animalfeeds Int'l Corp., 435 F. Supp. 2d 382 (S.D.N.Y. 2006), but the court of appeals reversed. *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008).

SUMMARY OF ARGUMENT

Neither the district court nor the court of appeals should have addressed Stolt-Nielsen's premature effort to obtain federal court review of the arbitrators' preliminary ruling on a procedural matter, and neither should this Court.

Judicial review of a ruling that addresses but does not itself even definitively resolve an issue relating to the future conduct of an arbitration contravenes the principle that only "ripe" controversies are justiciable in the federal courts. The speculative harm Stolt-Nielsen fears—the cost and procedural complexity that it attributes to class arbitration—may never come to pass. Review is premature where neither the parties nor this Court can predict whether the panel ever will certify a class for classwide arbitration.

The prematurity of such review is underscored by the careful limits that Congress has placed on judicial review of arbitration decisions, which are generally not reviewable until they result in a final award resolving the merits of some controversy submitted to the arbitrators.

The FAA provides that, upon issuance of an arbitration "award," courts have power to vacate, modify, or confirm it. But only issuance of the "award" triggers this judicial power. The FAA thus limits the authority of district courts to entertain petitions to vacate, modify, or confirm arbitral rulings. Preliminary decisions and procedural orders—including discovery orders, rulings addressing the time or location of arbitration, and decisions determining what set of rules

shall apply in arbitration—are not "awards" and therefore are not subject to immediate judicial review.

The panel's ruling on clause construction in this case falls into that category; it is a preliminary decision, not an "award." The ruling is not subject to immediate judicial review, and the district court had no authority to decide Stolt-Nielsen's petition to vacate.

Moreover, strong and longstanding policies against piecemeal review generally, and against repeated judicial interference in arbitration specifically, militate against judicial intervention at this preliminary stage of arbitration. Interlocutory appeals stymie arbitral efficiency and strain an already overworked judiciary. Better to postpone judicial review of a ruling on clause construction until at least the class-certification stage, or later, than to micromanage the arbitrators' every move.

Given this Court's unanimous holding in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), that orders concerning class certification are not final orders immediately appealable under 28 U.S.C. § 1291, permitting review of an arbitral ruling on clause construction—a ruling issued *prior to* one on class certification—creates an anomaly: greater opportunity for judicial review in arbitration than in litigation. Inviting such an untoward result does violence to the entrenched policy opposing piecemeal review and to the legislative preference for minimal judicial interference in arbitration.

Because the panel's clause-construction ruling was not ripe for review and did not satisfy the statutory prerequisites for review under the FAA, this Court should vacate the judgment of the court of appeals and remand with instructions for it to vacate the judgment of the district court.

ARGUMENT

I. The Case Is Not Ripe for Judicial Review.

This case is not ripe for review. Designed to avoid "premature adjudication," *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), ripeness is a justiciability doctrine that both implements Article III's case-or-controversy requirement and reflects additional, prudential considerations that require the federal courts to refrain from premature intervention in a nascent legal dispute. *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003). Even in its prudential form, ripeness is a doctrine that the Court may invoke on its own initiative, regardless of whether it has been raised and decided below. *Id.*

"A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)). Where the likelihood of harm is speculative, this Court has found cases unripe. *See, e.g., Nat'l Park Hospitality Ass'n*, 538 U.S. at 811; *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 59 n.20 (1993); *Poe v. Ullman*, 367 U.S. 497, 508 (1961). And if "no irremediable adverse consequences flow from requiring a later challenge," judicial intervention may be premature. *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967).

This Court has previously declared review premature where arbitrators had yet to render definitive rulings. For example, in *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 406-07 (2003), "mere speculation" that arbitrators would interpret ambiguous contractual provisions one way rather than another made judicial

intervention premature. Similarly, in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995), interlocutory review was premature when the Court could not predict what law the arbitrators would apply to the claims at hand.

Judicial review is likewise premature here because it remains speculative whether the arbitrators will order class proceedings. Class arbitration is a contingent future event that may not occur at all. As the Sixth Circuit observed in *Dealer Computer Servs., Inc. v. Dub Herring Ford*, 547 F.3d 558, 561 (6th Cir. 2008), a ruling on clause construction permitting class arbitration does not conclusively determine that claims *should* proceed as a class arbitration. Because class certification is "far from certain," *id.* at 562, the hardship Stolt-Nielsen fears is speculative at best.

In this respect, the case is similar to *Toilet Goods*, a case this Court found unripe. There, the regulations at issue *permitted* the Commissioner of Food and Drugs to order inspections of certain facilities, but the Court had "no idea whether or when such an inspection" would be ordered. *Toilet Goods*, 387 U.S. at 163. Here, similarly, the clause-construction ruling *permits* arbitration on a classwide basis, but neither the Court nor the parties can predict whether, when, or under what conditions the panel will certify a class. In the meantime, Stolt-Nielsen's complaints reduce to a reluctance to submit to even the *possibility* of class arbitration pure and simple.

It was, however, *Stolt-Nielsen* that sought to compel arbitration. Now, dissatisfied with the someday prospect of arbitrating on a classwide basis, *it* seeks refuge in the courts while lamenting the "added layers of judicial review, and inevitable resulting delays" that it contends inhere in class arbitration. *See* Pet'r Br. 32.

Stolt-Nielsen portrays class proceedings as longer, more complex, and therefore anathema to arbitration's expediency. *See* Pet'r Br. 31. But, whatever their merits, those policy arguments would be better addressed not in the abstract, but in a case in which arbitrators have at least actually ordered class arbitration, explained why they have done so, and devised or applied procedures for the arbitration. Here, however, Stolt-Nielsen invites this Court to impose a categorical rule against class arbitration absent the parties' express assent, in a case in which nobody even knows whether class arbitration proceedings will ever happen. The Court should decline that invitation at this time.

In sum, review of the panel's ruling on clause construction is premature. If and when Animalfeeds actually seeks class certification, the panel may or may not certify a class. Amid such speculation, judicial intervention is premature. Indeed, not only is the issue not ripe for review, but, as explained below, the arbitrators' ruling is insufficiently final to justify review under the Federal Arbitration Act itself.

II. The FAA Authorizes Vacatur of an "Award," and a Preliminary Ruling That an Arbitration Agreement Does Not Preclude Class Arbitration Is Not an "Award."

A. The FAA Limits Courts' Authority to the Review of an "Award."

The Court's consideration of whether the issues are sufficiently ripe to justify judicial intervention should also reflect consideration of the congressional policy, reflected in the FAA, of limiting judicial review to final

arbitration decisions.[3] Sections 9 through 12 of the Act contemplate judicial review of the final "award" rendered in an arbitration. *See* 9 U.S.C. §§ 9-12 (2006). Although the statute does not define the term "award," the term's plain meaning, its use in the statutory structure, and its history all reveal that an "award" is a final determination on the merits of a controversy submitted to arbitration.

1. **Text.** Unless a statute specifies otherwise, courts presume that Congress intends to accord words their plain meaning. *See Morissette v. United States*, 342 U.S. 246, 263 (1952). In ordinary, everyday use, an "award" is "something that is conferred or bestowed [especially] on the basis of merit or need." *Merriam Webster's Collegiate Dictionary* 81 (10th ed. 1996).

"Award" also is a legal term of art with an established meaning, and so Congress' decision to adopt it "may be taken as satisfaction with widely accepted definitions" in the law. *Morissette*, 342 U.S. at 263. An "award" is "[a] *final* judgment or decision, [especially] one by an arbitrator or by a jury assessing damages." *Black's Law Dictionary* 147 (8th ed. 2004) (emphasis added). In 1933, shortly after passage of the FAA, Black's Law Dictionary likewise defined "award" as "the decision or determination rendered by arbitrators or commissioners, or other private or extrajudicial deciders,

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[3] In federal administrative law, for example, the requirement of final agency action is not only a nonjurisdictional element of the right of action provided by the Administrative Procedure Act, *see Trudeau v. FTC*, 456 F.3d 178, 184-85 (D.C. Cir. 2006), but also a part of the Court's consideration of whether an issue is justiciable under the ripeness doctrine. *See Abbott Labs.*, 387 U.S. at 149. The latter issue, as noted above, is cognizable on the Court's own motion even if not raised or decided below. *See supra* at 5.

upon a controversy submitted to them." *Black's Law Dictionary* 177 (3d ed. 1933). Tellingly, this definition suggests that arbitrators render one "award"—"*the* decision"—upon a "controversy."

Similarly, about a decade before the FAA's enactment, Anderson's Law Dictionary defined award as "the judgment of the arbitrator upon the matters submitted." *See Ernst v. McDowell*, 33 Ohio Cir. Dec. 91, 1911 WL 1658, at *3 (1911). This definition refers to "the" judgment, again presupposing one "award." And the definition's reference to the "*judgment*" on the "matters submitted" strongly indicates that the award is the arbitrators' final merits disposition of the entire matter presented to them.

These definitions together paint a unifying picture: The "award" is the arbitrators' final determination on the merits, disposing of some controversy submitted to arbitration.

2. Structure. The structure of the FAA supports this understanding of the term "award." The Court, of course, "read[s] statutes as a whole." *United States v. Morton*, 467 U.S. 822, 828 (1984). FAA sections 9 through 11 refer to "*the* award," contemplating one arbitration "award" rendered at the conclusion of arbitration. *See* 9 U.S.C. §§ 9-11 (emphasis added).[4]

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[4] In pertinent part, the statute refers to "the award":

"[A] judgment of the court shall be entered upon the award made pursuant to the arbitration...." 9 U.S.C. § 9.

"[T]he United States court ... may make an order vacating the award...." *Id.* § 10.

"[T]he United States court ... may make an order modifying or correcting the award...." *Id.* § 11.

Section 9, moreover, demonstrates that an award is the arbitral equivalent of a final court judgment. Under section 9, unless the award has been vacated, modified, or corrected, a court *must* "confirm" it upon request of one of the parties. *Id.* § 9. By confirming "the award," the district court transforms it into an enforceable *judgment* of the court itself, appealable under 9 U.S.C. § 16(a)(1)(D) and 28 U.S.C. § 1291. The "judgments" of courts, of course, do not include non-final rulings on procedural matters. *See Holmes v. Jennison*, 39 U.S. 614, 625 (1840) (contrasting a "judgment" with "a decision on a collateral, or interlocutory point"). Rather, a "judgment" is generally a ruling that disposes of a case. *See Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948).

Section 10(a)(4), too, speaks to "finality." The statute authorizes vacatur of an arbitration "award" that purports to be "mutual, *final*, and definite," but is in fact not because the arbitrators have failed to discharge their duty. *See* 9 U.S.C. § 10(a)(4) (emphasis added); *see also Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980). The statute thus makes clear that a proper award must be mutual, *final*, and definite. An "award" that does not even purport to be final is no award at all.

3. History. Historically, a proper arbitration award was, among other things, "final" and "comprehend[ed] every thing submitted." Stewart Kyd, *A Treatise on the Law of Awards* 171, 208 (1808). In eighteenth-century British arbitration law, the term "final" embodied the core object of arbitration: "to prevent any future litigation on the subject of the submission." *Id.* at 208. Additionally, a proper arbitration award had to "comprehend every thing submitted, and must not [have] be[en] of parcel only." *Id.* at 171. In other words, the

award had to address all the matters submitted to arbitration; it had to be "complete."

The origin of section 10 of the FAA strongly indicates that it incorporates this concept of the award. Indeed, section 10's text can be traced to "such disparate sources as the Arbitration Act of 1698 and common law treatises by Blackstone, Chitty, and Kyd." Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 2009 J. Disp. Resol. 1, 30-31. Language identical to section 10 also appears in mid-nineteenth century American case law. *See Taylor v. Sayre*, 24 N.J.L. 647, 1855 WL 4284, at *2-3 (N.J. 1855) (noting that the language "procured by corruption or other undue means," which today appears in section 10(a)(1), was "copied" from the 1698 Arbitration Act); *Emmet v. Hoyt*, 17 Wend. 410 (N.Y. Sup. Ct. 1837) (citing revisions to the 1791 New York arbitration act, the language of which mirrors word-for-word the text of section 10). So although the FAA was modeled on New York's 1920 Arbitration Act, *see Hall Street Assocs., LLC v. Mattel, Inc.*, 128 S. Ct. 1396, 1406 n.7 (2008), the precise language dates back much further, lending further support to the notion that "finality," long an integral aspect of a proper arbitration "award," is embodied in the FAA.

4. Judicial Interpretation. It is therefore no surprise that modern federal courts require that an arbitration "award" be "final"—that it resolve *all* claims or issues submitted to arbitration, or else fix the rights and obligations of the parties as to some separable claim or set of claims—before courts may review it. *See, e.g., Fradella v. Petricca*, 183 F.3d 17, 19 (1st Cir. 1999); *Rocket Jewelry Box, Inc. v. Noble Gift Packaging, Inc.*, 157 F.3d 174, 176 (2d Cir. 1998).

In short, courts review *final* arbitration awards, and preliminary decisions and procedural orders are not final awards subject to immediate judicial review. Courts have identified discovery-oriented orders made in the early stages of arbitration, for example, as preliminary decisions or procedural orders, not "awards." *E.g.*, *Yonir Techs., Inc. v. Duration Sys. (1992) Ltd.*, 244 F. Supp. 2d 195, 206 (S.D.N.Y. 2002); *Yasuda Fire & Marine Ins. Co. of Europe Ltd. v. Cont'l Cas. Co.*, 840 F. Supp. 578, 579 (N.D. Ill. 1993). Likewise, decisions addressing the location of arbitration, *S. J. Groves & Sons Co. v. Am. Arbitration Ass'n*, 452 F. Supp. 121, 124 (D. Minn. 1978), the selection of rules applicable to arbitration, *Mobil Oil Indon., Inc. v. Asamera Oil (Indon.) Ltd.*, 372 N.E.2d 21 (N.Y. 1977), and the timeliness of a request for arbitration, *Ligon Nationwide, Inc. v. Bean*, 761 F. Supp. 633, 635 (S.D. Ind. 1991), have all been deemed interlocutory procedural rulings. None of them is an "award." Neither was an arbitrator's non-binding recommendation that a customer complaint be expunged from a broker-dealer's disciplinary record. *Karsner v. Lothian*, 532 F.3d 876, 886-87 (D.C. Cir. 2008) ("An expungement recommendation ... is not an award and, accordingly, the district court is without section 9 authority to 'confirm' it."). Nor was an arbitrator's decision addressing standing and the applicability of the "first sale" doctrine an "award." *COKeM Int'l, Ltd. v. Riverdeep, Inc.*, Nos. 06-CV-3331, 06-CV-3359, 2008 WL 4417323, at *2-3 (D. Minn. Sept. 24, 2008).

These decisions make clear that not every ruling by an arbitrator is an "award." More important, only a "final" award is subject to immediate judicial review under the FAA. Whatever arbitrators decide, they must decide "the whole ball of wax" on at least one of the claims submitted to them before judicial review is

available. *Publicis Commc'n v. True North Commc'ns, Inc.*, 206 F.3d 725, 729 (7th Cir. 2000).

To be sure, section 16(a)(1)(D) of the FAA contemplates appeals where a district court has confirmed (or denied confirmation of) a "partial award," and some courts have reviewed "partial awards," but only where the arbitrator's decision "finally and definitively disposes of a separate, independent claim." *Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 283 (2d Cir. 1986). Those courts have created, in effect, what one judge called "an arbitration analogue to Rule 54(b)," which authorizes appeal of partial *final* judgments. *Id.* at 284 (Feinberg, C.J., dissenting). Courts that have allowed such review have not, therefore, deviated from the fundamental requirement that an award be a final, merits ruling appropriate for incorporation in a judgment of a court. Insofar as courts do review "partial awards," those "awards" are "final" in their resolution of a severable controversy.

B. The Panel's Clause-Construction Ruling Is Not an "Award."

The arbitration panel here interpreted a contract and issued a clause-construction ruling. That preliminary decision is not an "award."[5]

To begin with, the clause-construction ruling does not satisfy the ordinary definition of "award." Nothing was "conferred or bestowed." The panel merely determined the effect of the contract's "silence" with respect to class arbitration and left it to the parties to decide how, if at

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[5] Although the panel titled its ruling on clause construction a "Partial Final Clause Construction Award," the substance of an arbitral ruling—not its nomenclature—determines its status. *See Publicis Commc'n*, 206 F.3d at 728.

all, to proceed. The panel neither endorsed class arbitration in this case nor so much as hinted that arbitration *shall* proceed as a class arbitration. Further, the ruling looks nothing like the prototypical "award" of damages. In fact, the ruling is even more preliminary than discovery-oriented rulings. It is a mere contract interpretation on a procedural issue imposing no affirmative duties on either party.

Moreover, the panel's clause-construction ruling is not "final." At this stage of the arbitration, the panel has not yet ruled on any, let alone all, of Animalfeeds' Sherman Act claims. And although the panel ruled on one aspect of a discrete procedural issue, many more remain, including the issue of class certification itself. Nor does the ruling on clause construction fix the "rights and obligations" of the parties. The ruling does not *entitle* either party to class arbitration. It obligates neither party to commence class proceedings. Of course, either party may, if it chooses—and if it meets all other requirements for class arbitration—opt to request that the arbitrators certify a class. But in the wake of this clause-construction ruling, perhaps the parties may settle prior to initiating class arbitration. Or perhaps no class may be certified. Given the numerous paths the case could follow *after* a ruling on clause construction permitting class arbitration, the panel's ruling is not "final" no matter the test applied. Moreover, the ruling is not a reviewable partial award. Far from resolving a separate *claim*, the panel's clause-construction ruling is "merely a first step in deciding all claims submitted to arbitration." *Michaels*, 624 F.2d at 413.

Stolt-Nielsen argues that the scope, rules, and limitations of arbitration agreements must be rigorously enforced. Pet'r Br. 17. That may be so, but parties to arbitration cannot confer power on courts to review

matters that the FAA itself does not render reviewable. *Hall Street*, 128 S. Ct. at 1404 (no expansion by private contract of section 10 grounds to vacate). And although the relevant rules to which the parties agreed—the AAA Supplementary Rules for Class Arbitrations—envision the possibility of immediate judicial review of a clause construction ruling, J.A. 56a ¶3, AAA certainly has no more authority to confer power on district courts than do the parties. Congress alone has that authority. *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 9 (1799) ("[T]he disposal of the judicial power ... belongs to congress.").[6]

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[6] In addition to being bound up with the Court's consideration of justiciability (*see supra* at 7-8 & n.3), the question whether the arbitrators' clause-construction ruling is a reviewable award within the meaning of FAA section 10 is "fairly included" within the question presented. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 56 (2006). The FAA finality issue is both a "predicate to an intelligent resolution" of the question presented, *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996), and "essential to the correct disposition of the other issues in the case." *United States v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980); *see, e.g.*, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 381 (1995) (threshold issue not raised below was fairly included because it was "impossible to consider" the question presented without addressing the "logically prior" issue). Stolt-Nielsen's entire case is premised on section 10(a)(4)'s grant of authority to federal courts to vacate the "award" where arbitrators have "exceeded their powers." *See* Pet'r Br. 14. The Court can logically and appropriately reach *that* question only if the clause-construction ruling at issue is in fact a reviewable "award" under section 10. It makes little sense to decide if the arbitrators "exceeded their powers" when they issued their clause-construction ruling if the FAA does not even authorize immediate judicial review of such a ruling at all. Absent a final award, the district court lacked statutory authority to consider Stolt-Nielsen's petition for

III. Premature Review of the Ruling on Clause Construction Would Frustrate Federal Policies Against Judicial Interference with Arbitration and Piecemeal Judicial Review.

Regardless of whether the issue is viewed from the standpoint of the ripeness doctrine or statutory authority for judicial review, interlocutory review of the panel's ruling on clause construction would frustrate strong, longstanding policies opposing unnecessary judicial interference in arbitration and opposing piecemeal review.

1. Once arbitration has been directed, minimal judicial interference in arbitration proceedings prevents delaying tactics and streamlines dispute resolution.[7] As this Court recently explained, sections 9 through 11 of the FAA are best seen as "substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[8] *Hall Street*, 128 S. Ct.

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vacatur, and this Court accordingly has no authority to consider it, either.

[7] The courts must, and do, retain full authority to consider "gateway" issues of arbitrability (including the enforceability of arbitration clauses under principles of state contract law) via their authority under sections 3 and 4 of the FAA to consider requests to stay proceedings pending arbitration and to compel arbitration. *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003). Once those issues have been judicially resolved and a matter held to be arbitrable, however, other issues such as arbitration procedure fall outside that category and are for decision by arbitrators in the first instance, with review as provided in the provisions for confirmation, vacatur, or modification of awards.

[8] This Court has made clear that review in the collective bargaining context is likewise limited. The rationale for

at 1405. After all, the purpose of the FAA was to "reverse the longstanding judicial hostility to arbitration agreements." *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 288-89 (2002). Arbitration, of course, is not litigation, and one of the main differences between the two is that "judicial review of an award is more limited than judicial review of a trial." *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 203 (1956). What this Court has said it does not want is "the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.'" *Hall Street*, 128 S. Ct. at 1405; *see also Metallgesellschaft*, 790 F.2d at 285 (Feinberg, C.J., dissenting) ("[Piecemeal review] will make arbitration more like litigation, a result not to be desired. It would be better to minimize the number of occasions the parties to arbitration can come to court; on the whole this benefits the parties, the arbitration process and the courts.").

2. In litigation as well "there has been a firm congressional policy against interlocutory or 'piecemeal' appeals[,] and courts have consistently given effect to that policy." *Abney v. United States*, 431 U.S. 651, 656 (1977); *see* 28 U.S.C. § 1291. That "finality" rule, which descends from the Judiciary Act of 1791, promotes judicial efficiency and deters "the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise." *Will v. Hallock*, 546 U.S. 345, 350 (2006) (internal quotations omitted).

"insulating arbitral decisions from judicial review" in that context is that "[i]f the courts were free to intervene ..., the speedy resolution of grievances by private mechanisms would be greatly undermined." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987).

This Court's treatment of appellate review of district courts' class certification decisions is especially instructive. In *Coopers & Lybrand*, 437 U.S. at 468, the Court held that orders concerning class certification are not appealable final orders under 28 U.S.C. § 1291. Thus, "[a]n order passing on a request for class certification" does not fall within the collateral-order doctrine. *Id.* at 469. Neither, presumably, would a ruling similar to the arbitrators' clause-construction decision here, which is more preliminary than a class-certification decision. The clause-construction ruling, even more so than a class-certification ruling, is effectively reviewable at some later date.

To be sure, Federal Rule of Civil Procedure 23(f) was eventually promulgated in reaction to *Coopers & Lybrand* to give courts *discretion* to hear appeals of class-certification rulings, but the rulemakers quite pointedly did not exercise their authority under 28 U.S.C. § 2072(c) to define such rulings as "final" orders appealable as a matter of right under section 1291. Stolt-Nielsen, by contrast, urges that the preliminary-stage arbitral clause-construction ruling is immediately reviewable as a matter of right in federal district court under section 10 of the FAA, and that the district court's decision to vacate (or modify or confirm) is then itself appealable as a matter of right under section 16 of the FAA and section 1291. Presumably, Stolt-Nielsen would take the same position with respect to an arbitral class-certification ruling as well.

Stolt-Nielsen's position, then, posits two layers of review as of right at two separate points in the arbitrators' decisionmaking process with respect to class arbitration, anomalously affording much greater opportunities for review of class determinations in *arbitration* than in *litigation*. *Cf. Metallgesellschaft*, 790

F.2d at 285 (Feinberg, C.J., dissenting) ("[T]he function of arbitration should make considerations of finality even more compelling in arbitration than they are in conventional litigation."). Not even in litigation, where at least theoretically under the narrowly construed collateral-order doctrine there is a marginally greater tolerance for piecemeal review, do courts countenance such a significant departure from settled principles of finality. *Coopers & Lybrand*, 437 U.S. at 468-70.

In short, two longstanding federal policies—the aversion to piecemeal review and the aversion to judicial interference with arbitration—underscore the point that review of the panel's clause-construction ruling in this case cannot be squared with the limits imposed on judicial review of arbitration awards by the ripeness doctrine and by the FAA itself.

CONCLUSION

The Court should vacate the judgment of the court of appeals and remand with instructions for the court of appeals to vacate the judgment of the district court.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-1198

In The Supreme Court of the United States

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF PUBLIC JUSTICE AND PUBLIC GOOD AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Public Justice, P.C. ("Public Justice") is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuse. Public Justice prosecutes cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

To further its goal of defending access to justice for consumers, employees, and other persons harmed by corporate misconduct, Public Justice has initiated special projects devoted to fighting abuses of mandatory arbitration, opposing expansive assertions of federal preemption, and preserving the availability and integrity of class action proceedings. Public Justice also regularly represents consumers and employees in class actions, and our experience is that the class action device, properly used, often represents the only meaningful way that individuals can vindicate important legal rights.

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[1] Letters granting blanket consent to the filing of *amicus curiae* briefs have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

Public Good is a public interest organization dedicated to the proposition that all are equal before the law. Through *amicus curiae* participation in cases of particular significance for consumer protection, civil rights, and civil liberties, Public Good seeks to ensure that the protections of the law remain available to everyone. Access to class action procedures for claims that would not otherwise be adjudicated or arbitrated exemplifies the rights that Public Good seeks to defend.

This case presents a convergence of mandatory arbitration, federal preemption, class action preservation, and access to justice issues that has potentially enormous implications for the rights of consumers and workers. The Petitioners urge the Court to hold that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, which is silent about class action proceedings, compels the interpretation of an arbitration agreement that likewise is silent about class actions to *prohibit* their availability to plaintiffs in *any* forum, arbitral or judicial. Public Justice and Public Good are gravely concerned that, if this position is adopted as law, there could be no limit to the ability of companies to eliminate class actions simply by having an arbitration clause. This is because the companies would invoke not just the unwritten interpretive rule urged by Petitioners, but also implied preemption rules would arguably flow from it. If Petitioners' principal argument were adopted, preemption arguments soon would follow that state laws preserving class actions when they are essential to

vindicate claims – which many states have – constitute an "obstacle" to the FAA's alleged "purpose and objective" to ban class actions whenever an arbitration clause does not explicitly authorize them.

Public Justice and Public Good thus submit this brief in support of Respondent urging the Court to reject the Petitioners' proposed interpretive rule and the far-reaching preemption consequences that could flow from it. Instead, the Court should affirm the decision below holding that the arbitration panel did not manifestly disregard applicable state and/or federal maritime law in holding that the parties' arbitration agreement does not, by virtue of its silence on the subject, prohibit class-wide arbitration.[2]

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the Second Circuit correctly held below that the arbitration panel did not exceed its authority in applying New York or federal maritime law to construe the parties' arbitration agreement not to prohibit class-wide proceedings. In urging reversal of this ruling, Petitioners ask the Court to hold that a statute that is silent about class

[2] We agree with Respondent and *amicus* Public Citizen that this case is not ripe or appropriate for consideration by this Court at this time. We submit this brief to explain why, if the Court nevertheless reaches the merits of Petitioners' arguments, it should reject them.

actions requires interpretation of a contract that likewise is silent about class actions to prohibit them from taking place in any forum.

This argument finds no support whatsoever in the text or purposes of the FAA, but would threaten to radically transform arbitration and litigation practice by stripping the plaintiffs in this and many other cases of an essential vehicle for vindicating their claims. This Court and many others long have recognized that class actions are essential for plaintiffs to vindicate important rights whose economic value could be dwarfed if those plaintiffs were required to pursue those rights on an individual basis. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). The parties do not dispute this. *See* Brief for Petitioners at 14. But the argument that the FAA prohibits class actions except where an arbitration clause expressly permits them would allow the companies that draft these provisions to eliminate class actions in any consumer or employment case involving a contract. Because Congress nowhere in the FAA even discusses class actions, let alone calls for their abolition, the Court should reject Petitioners' arguments to read into the Act a freshly minted rule to allow this result.

First, the FAA says nothing prohibiting, disfavoring, or even mentioning class actions or other multiparty disputes. *Cf. Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 n.5 (1989) ("As indicated, the FAA itself contains no provision designed to deal with the special

practical problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate."). There is thus no basis for finding that Congress meant to reach the sweeping result sought here of prohibiting class actions except where company contracts expressly allow them. Moreover, in applying the FAA, this Court has held repeatedly that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (ambiguity resolved in favor of finding that claims for punitive damages should be resolved in arbitration). Petitioners, however, are asking this Court to create a special, unauthorized and unprincipled class-action-only rule of interpretation that when class actions are involved, any doubts (indeed, lack of utter certainty) concerning the scope of arbitrable issues must be resolved *against* arbitration. The interpretation proposed by Petitioners, aimed at preventing arbitration of many disputes, stands a quarter-century of jurisprudence applying the FAA on its head. Thus, neither the FAA's express provisions nor its purposes long recognized by this Court support the result of preventing arbitration of class actions that is sought here.

Second, the Court also should reject this argument for inferring in the FAA a rule prohibiting class actions because adopting this unwritten rule could lead to significant preemption of state laws that do directly address this issue. A number of states have

fashioned rules to preserve the availability of class actions where they are shown to be necessary to vindicate claims. *See, e.g.*, *Feeney v. Dell, Inc.*, 908 N.E.2d 753, 762 (Mass. 2009) ("Here, expressions of three branches of Massachusetts government indicate that the public policy of the Commonwealth strongly favors G.L. c. 93A class actions."). But if the FAA were held to authorize or favor a prohibition of class actions, there would then arise the argument that this unwritten rule of substantive contract law preempts any state law aimed at preserving class actions when applied to cases subject to arbitration.

Again, although Congress chose not to expressly preempt any state laws under the FAA, the Act has been held to impliedly preempt state law that "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Volt Info. Sciences*, 489 U.S. at 477 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Thus, by recognizing an unwritten purpose to prohibit class actions absent their explicit authorization, the ruling urged by Petitioners would open the door to freewheeling and potentially far-reaching preemption of state law, notwithstanding the Court's repeated admonitions that "'the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (internal citation omitted).

In light of the foregoing, the Court should reject the Petitioners' invitation to create an unwritten rule under the FAA disfavoring class actions in arbitration and thereby potentially preempting state laws aimed directly at *preserving* this critical device for consumers and employees to vindicate their legal rights.

ARGUMENT

I. The FAA Does Not Prohibit, Disfavor, or Even Mention Class Actions.

During the 80+ years since the FAA was enacted, Congress has never disapproved or even addressed the availability of class actions in arbitration. This Court long has recognized as much, noting for example that the FAA "contains no provision designed to deal with the special problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate." *Volt Info. Sciences*, 489 U.S. at 476 n.5. The Court thus has found that a state arbitration statute giving courts "authority to consolidate or stay arbitration proceedings in these situations in order to minimize the potential for contradictory arguments" would "foster the federal policy favoring arbitration." *Id.*

Similarly, in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), the Court found that the issue of whether an arbitration clause prohibited class action proceedings was governed by "state law, not federal

law." *Id.* at 450 (plur. op.); *see also id.* at 455 (Stevens J., concurring in the judgment and dissenting in part) (FAA did not preclude determination based on state law that class action arbitration was permissible).

The FAA's silence on the availability of class actions in arbitration should be fatal to Petitioners' argument that the Act only permits class actions where a company's contract expressly allows them. First, the Act's silence on this issue deprives the Court of any basis for finding that Congress ever intended to enact such a rule of substantive contract law requiring express contractual authorization of class actions. *Cf. Engine Manuf.'s Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) ("'Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'") (quoting *Park 'N Fly, Inc. v. Dollar Park 'N Fly, Inc.*, 469 U.S. 189, 194 (1985)). Absent any statutory support whatsoever for this proposed anti-class-action rule of contract law, the Petitioners' arguments for reversal of the decision below should be rejected.

Second, the proposed interpretive rule disfavoring class actions in arbitration flies in the face of the ordinary presumption in *favor* of arbitrating claims that the Court long has found to apply under the FAA. As discussed, the Court repeatedly has held that the FAA's primary substantive provision making arbitration agreements enforceable, 9 U.S.C. § 2, establishes that, "as a matter of federal law, any doubts

concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, *supra*, 460 U.S. at 24-25. The gist of this rule is that the Federal *Arbitration* Act, by its express terms, was meant to encourage the enforcement of agreements for *arbitration* of disputes.

In the quarter-century since, the *Moses H. Cone* principle has been cited in over 1,500 court opinions. Moreover, this Court repeatedly has invoked it as a basis for holding that different types of claims were arbitrable whether or not they were specifically named in an arbitration clause. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights."); *Mastrobuono*, *supra*, 514 U.S. at 62 (citing *Moses H. Cone* as basis for finding punitive damages claims subject to arbitration under otherwise ambiguous agreement). Indeed, this Court has never held that any kind of underlying claim could only be arbitrated under the FAA if it was expressly identified in an arbitration clause.

Adoption of Petitioners' argument for a presumption *against* arbitration (or litigation) of class actions absent express contractual authorization thus would mark a sea-change in the Court's application of the FAA that finds no support in either the text or the heretofore observed purposes of the Act to facilitate arbitration of claims. Unlike the *Moses H. Cone* rule, Petitioners' proposed interpretive rule would read the

Federal Arbitration Act to *prohibit* arbitration of a significant body of disputes – making class actions the only disputes for which any doubts (or lack of utter certainty) concerning the scope of arbitrable issues would be resolved against arbitration.

Finding no answer in the FAA itself for reversing the ordinary presumption in favor of permitting arbitration of claims, Petitioners rely instead on what amount to naked policy arguments about arbitration and class actions. Petitioners contend that "[i]mposing class arbitration fundamentally transforms the nature and scope of the proceeding, turning it into something to which the parties never agreed" and that "[a]rbitrators are not authorized to order such a transformation." Brief for Petitioners at 27. But they cite no language in their actual contracts showing that class arbitration somehow "*transforms*" anything, or any language in the FAA suggesting that allowing class arbitration of a dispute would somehow "*transform*" the terms of the agreement to arbitrate.

Absent any contractual or express statutory support, Petitioners' arguments against arbitration of a class action are no different from the generalized arguments against arbitration of statutory claims that this Court has repeatedly rejected in applying the FAA. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) ("Such generalized attacks on arbitration 'rest on suspicion of arbitration as a method of weakening the protections afforded in substantive law to would-be complainants,' and as

such, they are 'far out of step with our current strong endorsements of the federal statutes favoring this method of resolving disputes.'") (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)).

Since the FAA provides no support whatsoever for a presumption against arbitration of class actions and instead has repeatedly been held to presumptively *favor* arbitration of claims, the Court should reject Petitioners' arguments and affirm the decision below holding that class-wide arbitration is not prohibited under applicable New York and/or federal maritime law that governs the claims in this case.

II. Adoption of Petitioners' Arguments Could Have Far-Reaching Preemptive Effects.

The absence of statutory support by itself should be fatal to Petitioners' proposed interpretive rule prohibiting or disfavoring arbitration of class actions under the FAA. An additional reason for not reading this interpretive rule into the statute arises from its potentially far-reaching preemptive effects.

A. A Number of States Have Developed Laws that Directly Address and Bar Contract Terms Prohibiting Class Actions Where Class Procedures are Necessary to Vindicate Claims Important to Those States.

Unlike Congress in the FAA, a number of states have developed law that directly addresses the effect of contract provisions expressly prohibiting class actions. For example, Massachusetts has a consumer protection statute giving consumers a specific right to bring a class action, Mass. Gen. Laws ch. 93A, § 9(2), and prohibits waivers of consumers' rights under the statute. *See Canal Elec. Co. v. Westinghouse Elec. Corp.*, 548 N.E.2d 182, 187 (Mass. 1989). Based on this established law, the Massachusetts Supreme Judicial Court found in addressing the validity of an arbitration clause's express prohibition of class actions that the "expressions of three branches of Massachusetts government indicate that the public policy of the Commonwealth strongly favors G.L. c. 93A class actions." *Feeney v. Dell, Inc.*, 908 N.E.2d 753, 762 (Mass. 2009). In light of this legislatively-based public policy, the court held that a provision expressly barring class actions was unenforceable as applied to claims challenging fraudulently labeled "sales tax" charges of $13.65 on the purchase of a personal computer because, "in the circumstances of a case such as this (small value claims sought under our consumer protection statute, G.L. c. 93A), a clause effectively prohibiting class proceedings in any forum violates the public policy of the Commonwealth." *Id.* at 766.

Other states have reached similar conclusions about contracts with class action bans that effectively prevent consumers from vindicating their claims in arbitral or judicial proceedings alike. In Washington, the State Supreme Court has found that the state's consumer protection statute, Wash. Rev. Code ch. 19.86, and state class action rule created public policy making class actions "vital where the damage to any individual consumer is nominal." *Scott v. Cingular Wireless*, 161 P.3d 1000, 1006 (Wash. 2007).[3] Applying this legislatively-based public policy to consumer claims found too small to vindicate individually, the court held that a contract provision barring class action treatment of these claims in arbitration was unenforceable. *Id.* at 1008. On the same day, the court reached exactly the same conclusion with regard to a *judicial* forum selection clause (*i.e.*, a clause that did not involve arbitration) that likewise barred class action proceedings. *See Dix v. ICT Group, Inc.*, 161 P.3d 1016, 1024-25 (Wash. 2007).

In New Jersey, the State Supreme Court similarly held that a provision expressly barring class actions for small-value, but factually complex, claims under the state's consumer protection statutes in

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[3] The court in *Scott* traced the rich factual record set forth in the trial court establishing as a matter of admissible evidence that the class action ban at issue in that case would bar the plaintiffs and others similarly situated from effectively vindicating their statutory causes of action. *Scott*, 161 P.3d at 1003-04.

arbitration was unenforceable. *See Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 100-101 (N.J. 2006). The court also held on the same day that an identical provision barring class actions in arbitration was valid and fully enforceable as applied to larger value consumer claims that were filed on an individual basis. *See Delta Funding Corp. v. Harris*, 912 A.2d 104, 115 (N.J. 2006).

Other states have taken different views of contract provisions prohibiting class actions. The State of Utah, for example, has enacted a statute expressly declaring that class-action bans in open-ended consumer credit contracts are valid. *See* Utah Code Ann. § 70C-4-105. In the District of Columbia, the District's Court of Appeals held that a judicial forum selection clause effectively prohibiting class actions was valid and enforceable. *Forrest v. Verizon Comm.'s, Inc.*, 805 A.2d 1007, 1013 (D.C. 2002).

In sum, all of these states and numerous others have done what Congress nowhere in the FAA ever did, *i.e.*, look directly at the issue of whether contracts can expressly or implicitly prohibit class actions. These states have resolved this issue in a variety of ways involving consideration of both freedom of contract and the ability of parties to effectively vindicate their statutory rights under applicable state law.

B. Petitioners' Proposed Interpretation of the FAA to Ban Class Actions When an Arbitration Clause Does Not Expressly Provide for Them Would Arguably Impliedly Preempt Many State Laws Based on the Alleged Frustration of Congress's "Purposes and Objectives."

Petitioners, though not their *amici*, disavow any preemption consequences of their proposed interpretive rule, contending that "if true contractual silence results in the unavailability of class arbitration, traditional principles such as fraud, duress, or unconscionability could lead a court to void an arbitration provision entirely under Section 2 of the FAA." Brief for Petitioners at 14. This assessment is correct as a statement of *current* law. *See, e.g.*, *Homa v. American Express Co.*, 558 F.3d 225, 230 (3d Cir. 2009) ("In other words, the defense [New Jersey law] provides is a general contract defense, one that applies to all waivers of class-wide actions, not simply those that also compel arbitration. Therefore, there are no grounds for FAA preemption.") (citing *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1221 (9th Cir. 2008)).

But whether this still would be the law upon adoption of Petitioners' proposed interpretive rule prohibiting class actions where a company contract does not expressly allow them is far from clear. *See, e.g.*, Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioners at 19 ("Significantly, the FAA mandates

displacement not only of [state law] rules that keep parties out of arbitration altogether, but also of arbitration-specific rules that allow arbitration to proceed, but recast the arbitration in ways contrary to the parties' intent."). This uncertainty arises not just from the fact that the proposed rule itself is nowhere to be found in the FAA, but also from the fact that the preemption argument that Petitioners' *amici* would invoke also is nowhere to be found in the FAA's text.

This Court long has recognized that "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sciences*, 489 U.S. at 477. Instead, preemption under the FAA arises through the doctrine of implied conflict preemption, where state law may be preempted "to the extent that it actually conflicts with federal law – that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Hines v. Davidowitz*, *supra*, 312 U.S. at 67). The relevant preemption inquiry thus would be whether a state law that invalidates a contract provision prohibiting class actions where they are necessary to vindicate claims would be deemed to "undermine the goals and policies of the FAA." *Volt Info. Sciences*, 489 U.S. at 478.

The Petitioners' professed certainty as to how this preemption issue would be resolved is misplaced. As often has been noted, the doctrine of implied conflict preemption based on alleged frustration of

statutory purposes and objectives defies precise application. Indeed, it has been deemed "problematic" precisely because it "encourages an overly expansive reading of statutory text," in which a court's "desire to divine the broader purposes of the statute before it inevitably leads it to assume that Congress wanted to pursue those polices 'at all costs' – even when the text reflects a different balance." *Wyeth v. Levine*, 129 S. Ct. 1187, 1215 (2009) (Thomas, J., concurring in the judgment) (quoting *Geier v. American Honda Motor Co.*, 529 U.S. 861, 904 (2000) (Stevens, J., dissenting)). Moreover, a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" has been recognized to "undercut the principle that it is Congress rather than the courts that pre-empts state law." *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

These concerns are particularly resonant here because the unwritten Congressional purpose to disfavor class actions would not even be based on any textual provision of the FAA, but rather on the likewise unwritten interpretive rule that Petitioners urge upon the Court here. If this rule prohibiting class actions except where a company's arbitration clause expressly allows one were adopted as federal law, then a state-law rule of the type discussed above – requiring the availability of class actions where proven necessary to vindicate claims – would at least

arguably conflict with the FAA's unwritten purpose to allow their prohibition.

Creation of a rule under the FAA limiting the availability of class actions also could greatly expand the already considerable range of state laws held to be impliedly preempted. Although the FAA says nothing about preemption, the Court has found implied preemption based on the Act's express command that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In light of this provision, the Court has held that state laws prohibiting, restricting, or delaying access to arbitration are preempted as applied to cases covered by arbitration clauses. *See Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (state law barring arbitration of franchise disputes); *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987) (state law barring arbitration of wage and hour claims); *Allied-Bruce Terminix Co.'s, Inc. v. Dobson*, 513 U.S. 265, 269-70 (1995) (state law barring enforcement of pre-dispute arbitration agreements); *Doctor's Assoc.'s, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (state law imposing unique disclosure requirements for arbitration clauses); *Preston v. Ferrer*, 552 U.S. 346, 128 S. Ct. 978, 987 (2008) (state law requiring administrative proceeding before claims can be arbitrated). In each case, the state law at issue restricted access to the arbitral forum, and thereby was deemed to conflict with the FAA's express provision making arbitration clauses enforceable. *See, e.g., Preston*, 128

S. Ct. at 987 ("[I]t bears repeating that Preston's petition presents precisely and only a question concerning the forum in which the parties' dispute will be heard.").

The Petitioners here, by contrast, seek to expand the FAA's reach, beyond the express language of the statute, to make the arbitral forum *unavailable*. Indeed, Petitioners are seeking to *prevent* Respondent from arbitrating or litigating a class action in the absence of any statutory or contractual prohibition from doing so. The Court should not allow Petitioners to succeed in this gambit. Once an unwritten purpose to disfavor class actions is recognized under the FAA, then arguments for recognizing a likewise unwritten intent to preempt state law will quickly follow. Since Congress nowhere in the FAA even addresses the availability of class actions, the Court should reject this invitation to open the door to the implied preemption of state laws aimed at preserving the class action device where it is deemed essential to vindicating the rights of consumers and employees.

CONCLUSION

For the reasons set forth herein, the United States Court of Appeals for the Second Circuit's decision should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,
Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

DRI – The Voice of the Defense Bar ("DRI") is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient.

To promote these objectives, DRI participates as *amicus curiae* in cases, such as this one, that raise issues of import to its membership and to the judicial system. Based on its members' extensive practical experience, DRI is uniquely well suited to explain to the Court why class arbitration is a fundamentally different, more complex, and expensive process than individual arbitration. The Second Circuit's opinion, which effectively equates contractual silence with consent to class arbitration, will subject numerous defendants to the very financial risks and burdens they sought to contain by contracting for arbitration.

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Arbitration is favored under federal law, the laws of many states, and this Court's jurisprudence, because it is inexpensive, streamlined, and efficient. Class arbitration, by contrast, is a markedly different procedure that offers none of these advantages. It is costly, risky, cumbersome, and may even involve substantial judicial oversight – the very attributes that generally motivate parties to choose traditional arbitration over litigation in the first place.

Arbitration agreements, like other contracts, must be enforced according to their terms. But there is no doctrinal support – and no principled justification – for subjecting parties to an alternative, non-judicial proceeding to which they never agreed, either expressly or implicitly. Accordingly, this Court should reverse the Second Circuit's holding that "silent" contracts may be interpreted to permit class arbitration unless it is clearly excluded. Pet. App. 28a. The rationale of the decision below – which effectively results in a presumption favoring class arbitration – derives from a misperception of this Court's plurality opinion in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). Unfortunately, a similar misapprehension of *Bazzle* permeates the decisions of arbitrators who have been called upon to resolve clause construction disputes regarding class arbitration. In the past few years, as a consequence, arbitrators have become overly eager to authorize class arbitration, even at the expense of other express terms in the parties'

agreement that are flatly incompatible with mass arbitral proceedings.

This *amicus curiae* brief addresses arbitral decisions that represent glaring departures from contract language, some of which employ an indefensible presumption favoring class arbitration. Such departures from the parties' contractual language and intent would be cause for grave concern in any circumstances. That they arise in the context of arbitral determinations that often are not subject to searching substantive judicial review – and that potentially affect the rights of parties with respect to a mass group of nonparticipating "claimants" – should set off alarm bells. This Court should heed the alarm.

Class arbitration simultaneously removes the protections – including Constitutional due process requirements – afforded parties in class action litigation and eliminates the traditional advantages of arbitration. In fundamental respects, class arbitration runs directly counter to the stated objectives of arbitration. Where arbitration promotes informal decisionmaking by experts in the substantive field in dispute, class-wide proceedings require strict adherence to procedural regularity in order to protect the rights of absent class members. And, there is no assurance that arbitrators in such proceedings have any experience, much less expertise, in conducting the process in a way that adequately protects the rights of all potentially affected participants and non-participants. Equally as important, a highly valued attribute of single party v. single party arbitration is the desire to

preserve confidentiality. That benefit, too, is lost in class arbitration since such proceedings result in publicly available awards. Perhaps most important of all is the uncertainty surrounding the finality of any result in a class arbitration. Unlike a traditional, single party v. single party arbitration that can be reduced to an enforceable, confirmed judgment under the Federal Arbitration Act ("FAA"), class arbitrations do not provide absent parties – or the respondent – any certainty of finality or repose. Because arbitration proceedings are, by definition, more informal and less bound to legal procedures and standards, serious questions will remain over the binding effect of any decision. In short, class arbitration is not an inherently desirable process, is not entitled to any favorable presumption, and should not be imposed on parties who have not expressly agreed to it.

As important as these governing rules are in the context of domestic contracts, they are even more vital with respect to transnational agreements. In the arena of international commercial transactions it should be undeniable that parties whose contracts do not expressly contemplate class arbitration should not – under the fiction of honoring their contractual intent – be relegated to a procedure they strenuously oppose.

ARGUMENT

Consistent With the Rule that Arbitration Contracts Must Be Enforced as Written, Courts Should Not Impose Class Arbitration on Parties to Silent Agreements

In holding that an arbitration agreement which is admittedly silent regarding class arbitration should nonetheless permit it, the Second Circuit joined several other courts – and numerous arbitrators – in misreading this Court's plurality opinion in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), as a tacit endorsement of class arbitration in such circumstances. Based on the experience parties to "silent" agreements have gained in the six years since *Bazzle* was decided, it is no exaggeration to say that the issue has developed in ways that were not intended by this Court, by Congress, or by parties who could never have imagined that their "silence" could be so profoundly distorted.

Indeed, it was not until *after*, and in response to, the decision in *Bazzle* that the leading domestic arbitral organizations even developed procedures for handling class action arbitration: the American Arbitration Association ("AAA") did not issue procedures to govern class arbitrations until October 2003, and JAMS had none until 2005. *See* AAA Supplementary Rules for Class Arbitrations (Oct. 8, 2003), http://www.adr.org/sp.asp?id=21936 ("AAA Supplementary Rule(s)"); JAMS Arbitration Rules Archive, *available at* http://www.jamsadr.com/rules-rules-archive. The agreement in this case was based

on a version first published more than 50 years ago, when silence on the subject of class arbitration – a procedure that was essentially nonexistent – was the norm. *See* Pet. Br. 4. In these circumstances, it is counterfactual to conclude that parties should have known to draft provisions about a process that did not exist in its present form. And it is even more counterfactual to conclude that "silent" contracts should favor class arbitration.

A. Arbitrators Have Overreached Their Authority in Construing Silent Agreements to Permit Class Arbitration

The reality since 2003 is that arbitrators have fallen into two related mistakes: (1) they have been too quick to deem a contract "silent" on class arbitration even in the face of provisions that are flatly incompatible with such mass arbitration, and (2) they have been too quick to conclude that such silence is tantamount to acquiescence in class arbitration. In short, in the wake of *Bazzle*, 539 U.S. 444, arbitrators issuing "clause construction" decisions overwhelmingly favor class arbitration – even where there is no evidence the parties intended to allow it. David S. Clancy, "Re-Evaluating *Bazzle*: the Supreme Court's Celebrated 2003 Decision Says Much Less About Class Action Arbitration Than Many Assume," 7 Class Action Lit. Rept. (BNA) 649, at p. 2 (Sept. 22, 2006). Indeed, the AAA's written policy states that, pursuant to *Bazzle*, it will administer class arbitrations if the agreement incorporates AAA rules and if "the agreement is silent with respect to class claims, consolidation or

joinder of claims." AAA Policy on Class Arbitrations (July 14, 2005), *available at* http://www.adr.org/Classarbitrationpolicy.

As one arbitrator acknowledged:

> Although the AAA, as an institution, takes no position regarding class arbitration, the overwhelming majority of Clause Construction Awards under its Class Arbitration Rules have held that, where the arbitration clause contains broad language similar to that here, and is silent on whether a class proceeding is contemplated or not, class arbitration is permitted.

Depianti v. Bradley Mktg Enters., Inc., AAA No. 11 114 00838 07 (Am. Arb. Ass'n Aug. 1, 2008) (Jentes, Arb.) (Partial Final Clause Construction Award And Rulings on Respondents' Motions To Dismiss), *available at* http://www.adr.org/si.asp?id=5442, at 9.

In order to assist the Court in its consideration of the important issues in this case, we have reviewed published class arbitration awards to discern the factors that led arbitrators to these lopsided results. That review shows that, absent an express contractual prohibition of class arbitration, arbitrators will find the agreement "silent" and, further, that they will regard such deemed silence to permit class arbitration. In sum, arbitrators have expanded this Court's delegation in *Bazzle* of a limited question of contract interpretation into a license to make the policy determination – not rooted in contractual language or intent – that class arbitration is preferred.

With respect to the threshold question whether a contract is "silent" on the subject of class arbitration, the decisions indicate that, as a practical matter, arbitrators will find such silence even when other contractual provisions point decisively against class arbitration. For example, the respondents in one arbitration argued that their agreement had a confidentiality provision that was inconsistent with class arbitration. *Terrapin Express v. Airborne Express, Inc.*, AAA No. 11 199 01536 05 (Am. Arb. Ass'n May 9, 2006) (Hodge, Longhofer & Farber, Arbs.) (Clause Construction Award), *available at* http://www.adr.org/si.asp?id=3952, at 4-5. But the panel of arbitrators gave this confidentiality provision no weight because (among other reasons) it was drafted by respondents, and their failure to exclude class arbitration "signifie[d]... that the intention of the parties was to permit class arbitration." *Id.* at 6. In so ruling, the arbitrators failed to recognize that confidentiality, a hallmark of arbitration, is inconsistent with class arbitration: "The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitration. All class arbitration hearings and filings may be made public...." *See* AAA Supplementary Rule 9(a).

Likewise, in *McCague v. Corinthian Colleges, Inc.*, AAA No. 111 434 01278 08 (Am. Arb. Ass'n May 11, 2009) (Widman, Arb.) (Partial Final Clause Construction Award), *available at* http://www.adr.org/si.asp?id=5733, at 7, the arbitrator rejected respondent's concern that federal law regarding the confidentiality of student educational records would be violated in class arbitration, on the grounds that

the Agreement allowed the *arbitrator* to see the student records (apparently equating that disclosure with full public disclosure), and because, if the case reached the merits, "necessary protections can *likely* be put in place" (emphasis added).

In another instance, an arbitrator found that contractual language giving every potential plaintiff the right to arbitration "within 100 miles" of the customer's residence did not preclude a nationwide class arbitration, finding that plaintiffs could simply opt out of the class action if they preferred a more convenient venue. *XM Satellite Radio, Inc. v. Enderlin*, AAA No. 11 181 00989 06 (Am. Arb. Ass'n Aug. 13, 2008) (Wilkinson, Arb.) (Class Action, Clause Construction Partial, Final Arbitration Award), *available at* http://www.adr.org/si.asp?id=5412, at 5-6.

And in another proceeding, an arbitrator found that the contractual provision giving "each party" the right to select an arbitrator did not bar class arbitration, even though absent class members did not participate in the selection of arbitrators (and the respondent was deprived of its express contractual right to select an arbitrator for the dispute with each claimant). *Anderson v. Check 'N Go of Cal., Inc.*, AAA No. 11 160 03021 04 (Am. Arb. Ass'n June 20, 2005) (Slater, Arb.) (Partial Final Clause Construction Award of Arbitrator), *available at* http://www.adr.org/si.asp?id=3922, at 8.

As a final example, in *Tomeldon Co., Inc. v. Medco Health Solutions, Inc.*, AAA No. 11 193 00546 06 (Am. Arb. Ass'n Nov. 22, 2006) (Hare, Katzenbach & LaMothe, Arbs.) (Partial Final Award Re: Clause

Construction), *available at* http://www.adr.org/si.asp?id=4516, the arbitration panel determined that a contract permitted class arbitration despite the contract's fee-shifting provision. Such a provision is necessarily incompatible with class arbitration because the defendant contracted to pay the fees of only one plaintiff – not all at once – if it loses, and because if the defendant wins it would be totally impractical to collect its prevailing party fees from absent class members.[2]

Having made the initial mistake of finding "silence" even where provisions incompatible with class arbitration reverberate throughout the contracts, arbitrators have erected – as a matter of policy, not contract interpretation – a virtual presumption favoring class arbitration. As one arbitrator concluded, "class arbitration is permitted because it was not expressly barred." *Lichter v. Alarm One, Inc.*, AAA No. 11 180 00240 08 (Am. Arb. Ass'n Aug. 13, 2008) (Widman, Arb.) (Pre-Hearing Order No. 2 – Partial Final Clause Construction Award), *available at* http://www.adr.org/si.asp?id=5409, at 6. Another arbitrator opined that "[i]f the person drafting the revised arbitration

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[2] These examples do not by any means exhaust the list of contractual provisions that should preclude class arbitration. Other illustrations include contracts that expressly incorporate the rules of organizations that, in turn, either bar or make no provision for class arbitration; contracts that place a monetary cap on disputes subject to arbitration; contracts that exclude from arbitration certain remedies that make it unlikely that class-wide determination was acceptable to the parties; and contracts that describe anticipated arbitral proceedings in ways that are simply not suited to class-wide disposition.

agreement form wanted to exclude class or representative arbitrations, he or she could have and should have said so, plainly." *Harris v. Teletech Holdings, Inc.*, AAA No. 11 160 02701 04 (Am. Arb. Ass'n Dec. 16, 2005) (Barnes, Arb.) (Clause Construction Order), *available at* http://www.adr.org/si.asp?id=3823, at 7.

Some arbitrators have expressly found – albeit incorrectly – that *Bazzle* itself places an additional burden on parties to "draft around" *Bazzle* to exclude class action arbitration. One arbitrator concluded silence meant acquiescence to class arbitration because *Bazzle* "clearly signal[ed] countrywide that arbitrators would be dealing with class arbitrations. In other words, [Respondent] had notice of its drafting responsibilities to preclude class claims if that was its desire." *Lichter*, at 7. Indeed, that arbitrator also inaccurately concluded that *Bazzle* "effectively affirm[ed] the South Carolina Supreme Court's holding that class-wide arbitration is [proper] when the arbitration agreement is silent." *Lichter* at 4. Yet another arbitrator found *Bazzle* "agree[d] with" the state court's ruling that class arbitration is permitted if the agreement is silent. *Bezaury v. Arbor Homes, LLC*, AAA No. 11 148 02161 04 (Am. Arb. Ass'n Jan. 31, 2005) (O'Leary, Arb.) (Clause Construction Award of the Arbitrator), *available at* http://www.adr.org/si.asp?id=3902, at 6. Similarly, in *Tomeldon*, the arbitrators found that an agreement permitted class arbitration in part because it was amended post-*Bazzle* but failed to

exclude class arbitration.[3] As these examples show, arbitrators have ascribed to the *Bazzle* plurality opinion rulings and presumptions that do not exist.

The real life experience of how arbitrators have totally misunderstood *Bazzle* is all the more problematic because these arbitral mistakes are often not subjected to searching substantive review. As a consequence, the losing party is relegated to a complex, high-stakes, class arbitration procedure to which it never actually agreed (although contractual agreement to arbitrate is supposedly the cornerstone on which the entire arbitration system rests) and in which it is deprived of substantial rights, including the benefits of finality and repose even if it wins on the merits (although class-wide finality and repose are supposedly principal attributes of class action procedures in litigation).

B. Class Arbitration is Fundamentally Different from Individual Arbitration and from Class Action Litigation

There is no principled basis for empowering arbitrators to create, as a matter of policy, a "default" presumption that an arbitration agreement which is silent on class arbitration should be construed to

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[3] The same arbitrators also relied on the fact that AAA issued its Supplementary Rules regarding class arbitration prior to amendment of the parties' agreement. *Tomeldon* at 5. But AAA Supplementary Rule 3 states, "In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor in favor of or against permitting the arbitration to proceed on a class basis."

permit it. Quite the contrary presumption should be operative due to the substantial differences between class arbitration and other procedures. First, parties typically enter arbitration agreements to take advantage of the traditional benefits of efficiency, simplicity and confidentiality. These attributes do not exist in class arbitration, which by its nature is protracted, complex and public. Second, despite the recent efforts of some arbitration organizations to create class arbitration procedures similar to those for litigation, numerous vital safeguards are lacking. Third, federal policy favors resolution of class actions in federal courts. Accordingly, "class arbitration is a proceeding of profoundly different substance and scope, in which many of millions of dollars and the company's future could be at stake." David S. Clancy & Matthew M.K. Stein, "An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History," 63 Bus. Law. 55, 72 (Nov. 2007). For these compelling reasons, private disputes should be subject to class arbitration only if the parties' contracts expressly so provide.

1. The Benefits of Individual Arbitration Do Not Exist in Class Arbitration

During the Congressional hearings on the FAA, witnesses testifying in favor of arbitration touted its inherent advantages. These included the "prompt, inexpensive, and procedurally streamlined" nature of arbitration, and the "face-to-face" component which encouraged an atmosphere of conciliation. *Id.* at 58-61. The Senate Judiciary

Committee described arbitration, as anticipated under the FAA, as follows:

> In contrast with the long time required by courts with their congested calendars to settle a dispute, the records of the [AAA] show that the average arbitration required but a single hearing and occupied but a few hours of the time of disputants, counsel and witnesses...

Id. at 61-62 (quoting S. Rep. No. 68-536, at 3 (1924)). Consistent with the clearly expressed legislative understanding, this Court has acknowledged that parties choosing arbitration "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

Class arbitration, by contrast, provides none of these advantages. First, class arbitration can be as costly as class action litigation – indeed, even more expensive. Unlike litigation, class arbitration imposes on parties the additional cost of paying the often substantial fees of an arbitrator – or a panel of arbitrators – stretching over many hearings on clause construction, on class certification, on the merits of class-wide claims, and on claims administration. With "millions of dollars and perhaps the company's future...at risk," and absent "the safeguards litigation provides[,]... the consequences of an unreviewable arbitral error are so great that arbitration is no longer a viable option." Clancy & Stein, *supra*, at 71, 73-74 (internal

citations omitted). Moreover, one right that parties commonly bargain for in arbitration agreements is the right to choose the arbitrator, or to choose one or more arbitrators in a panel. Yet, for all parties, this right is fundamentally inconsistent with class arbitration. Absent class members by definition do not participate in arbitrator selection. Imposing class arbitration, in which only one or a few plaintiffs will choose the arbitrator, in spite of contract provisions giving each prospective claimant the right to do so, would violate the absent plaintiffs' due process rights. *See Anderson*, AAA No. 11 160 03021 04, at 8 (ignoring the arbitrator selection provisions in order to construe the clause in favor of class arbitration). In addition, the respondent is deprived of its contractual right to participate in the selection of arbitrators with respect to claims by absent class members.

Another right that parties to arbitration expect is the right to have their disputes resolved confidentially. Typically, arbitration awards are confidential (*see* AAA Supplementary Rule 9(a)); indeed, arbitrators are generally discouraged from writing opinions explaining the rationale for their awards. *See, e.g., United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960); *Domke on Commercial Arbitration* § 29:06 (G. White rev. ed. 1984). But class arbitration is antithetical to confidentiality, and in AAA class arbitrations the parties can expect their demands and all rulings will be publicly posted on the Internet. *See generally* AAA Searchable Class Arbitration Docket, *available at* http://www.adr.org/sp.asp?id=25562. Thus, again, class arbitration is a very different procedure from

individual arbitration and should not be imposed on parties who did not expressly choose it.

In its consideration of this case, the Court should be mindful of the larger context in which the questions arise. Principal among the benefits generally attributed to class-wide determination of legal and factual issues under Rule 23 is the availability of a mechanism for the resolution of claims that, individually, are too small to justify the expense of litigation. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 616 (1997). But parties to contracts with arbitration clauses have already provided a mechanism for inexpensive, informal dispute resolution: the single party v. single party arbitration itself. In these circumstances, is there any valid justification for creating new short-cuts to encourage the prosecution of claims that are *too small to justify individual arbitration?* The answer is plainly no. And the Court should refrain from making – and from endowing arbitrators with the authority to make – what is essentially a policy judgment to favor class arbitrations, especially where that is a policy judgment that neither Congress nor the parties to "silent" contracts have ever expressed.

2. The Risks Associated With Class Arbitration Are Not Mitigated By the Same Procedural Safeguards as in Class Action Litigation

Class action litigation with the judicial oversight of the courtroom guarantees certain protections that benefit both plaintiffs and defendants. Defendants benefit from procedural mechanisms, such as

motions to dismiss, to end meritless and frivolous litigation before discovery or trial. Plaintiffs – particularly absent class members – benefit from due process rights designed to protect their interests. Both sides benefit from full, substantive judicial review. But none of these protections is assured in arbitration, and some are nonexistent.

a. Class Arbitration Provides No Guaranteed Opportunities to Cut Short Meritless Claims, Creating Improper Pressure for Defendants to Settle

With particular reference to the potential abuses of class action litigation, this Court has been alert to require safeguards that prevent defendants from facing the inordinate risks and expense or defending against nonmeritorious claims. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (finding that to avoid a motion to dismiss, the plaintiffs' class action complaint must "possess enough heft to show that the pleader is entitled to relief") (internal quotations omitted); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) ("District courts must be especially alert to identify frivolous claims brought to extort nuisance settlements..."); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 168 (1974) (noting that adoption of a rule that defendants must pay to notify class members would "encourag[e] frivolous class actions" and cause defendants to pass defense costs on to their customers) (citation omitted). Indeed, the development of the class action device in litigation has always been accompanied by such safeguards,

lest the sheer magnitude of potential financial exposure coerce settlement of baseless suits.

In litigation, motions to dismiss and motions for summary judgment are common methods defendants and courts employ to dispose of legally and factually deficient lawsuits short of trial. *See, e.g.*, Fed. R. Civ. P. 12(b)(6) & 56. But in arbitration, most defendants lack the right to be heard on a motion to dismiss. Dispositive motions in arbitration are not encouraged and are rarely granted.[4] In fact, "[s]ummary judgment in AAA arbitration is so rare as to be statistically insignificant." Lewis L. Maltby, "Employment Arbitration and Workplace Justice," 38 U.S.F. L. Rev. 105, 113 (Fall 2003). In individual arbitration, the absence of such motions practice serves one of the primary purposes of arbitration – simplification of proceedings. And that absence can be justified in individual arbitration as one of the tradeoffs the parties may make in order to achieve the goal of quicker, less expensive, less formal proceedings that provide an opportunity for face-to-face presentations to the ultimate decisionmakers.

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[4] *See* David Sherwyn, "Because it Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication," 1 Berkeley J. Emp. & Lab. L. 1, 27 & n. 122 (2003); Marc I. Steinberg, "A Decade After McMahon: Securities Arbitration: Better for Investors Than the Courts?" 62 Brooklyn L. Rev. 1503, 1513-14 & n. 56 (Winter 1996). *Cf.* Jill I. Gross, "McMahon Turns Twenty: The Regulation of Fairness in Securities Arbitration," 76 U. Cin. L. Rev. 493, 496-97 (Winter 2008) (noting that the SEC amended its Code of Arbitration Procedure for Customer Disputes (Customer Code) to authorize dispositive motions practice).

But those justifications are incompatible with the practical demands of class arbitration: the unavailability of pre-hearing dispositive motions will unnecessarily and unfairly prolong cases that are devoid of legal or factual merit. As this Court has explained, the requirements of Federal Rule of Civil Procedure 8(a) are designed to prevent "a plaintiff with 'a largely groundless claim' [from] 'tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'" *Twombly*, 550 U.S. at 557-58 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347-48 (2005)).

Precisely because of such unwarranted pressure, the Seventh Circuit's instructive opinion in *Rhone-Poulenc* reversed the certification of a class. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (Posner, J.). In that case, a class of people with hemophilia sued numerous drug companies, alleging their products infected plaintiffs with AIDS. Because each individual claimant could recover millions if victorious, defendants faced approximately $25 billion in liability – and almost certain bankruptcy – if they lost. *Id.* at 1298-99. But, in 92.3% of the past judgments on this issue (12 out of 13), the defendants had prevailed. *Id.* at 1299. The court reversed the class certification decision, which included a plan for a single trial, because it was grossly unfair to the defendants to have to bet their businesses on one jury trial, rather than several decentralized trials. *Id.* As the Seventh Circuit explained, "They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." *Id.* at 1298; *see also*

Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 168 (3d Cir. 2001) (noting that "granting [class] certification may generate unwarranted pressure to settle nonmeritorious or marginal claims"); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (reversing class certification where a $200,000 dispute was transformed into a $200 million dispute, which "puts a bet-your-company decision to [defendant's] managers and may induce a substantial settlement even if the customers' position is weak"); *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Class certification magnifies and strengthens the number of unmeritorious claims.... [This] creates insurmountable pressure on defendants to settle.... The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low") (citations omitted). Absent the procedural mechanisms to end meritless class claims at a pre-trial stage, defendants will be under even greater pressure to settle class arbitration than class action litigation. The mistake of unleashing such coercive pressure is magnified where the parties never expressly agreed to class arbitration in the first place.

b. Absent Class Members Do Not Have the Same Due Process Rights in Arbitration as in Litigation

As this Court has been vigilant to observe, absent class members in litigation have certain due process rights guaranteed by the Fourteenth Amendment to the Constitution. Specifically, the Due Process Clause mandates that absent class

members cannot be bound by any judgment in a class action unless they have had notice that describes the action and the parties' rights in it, an opportunity to opt out of the class, as well as adequate representation of their interests by the named class member(s) and their counsel. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). If the parties to a class action settle, the court must review and approve that settlement to ensure fairness to absent class members. Fed. R. Civ. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval"); *Amchem*, 521 U.S. at 627 (reversing certification along with settlement that failed to provide any "structural assurance of fair and adequate representation" for all plaintiffs). Congress has singled out particular types of settlements that it deems improper, including those where most or all the money was paid to class counsel rather than to class members, or where class members receive only a "coupon" for products or services. S. Rep. No. 109-14, at 15 (2005), *reprinted in* 2005 U.S.S.C.A.N. 3, 16 (Leg.Hist.) (Class Action Fairness Act of 2005). It is only because such procedural due process protections are provided that an absent class member "may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Phillips*, 472 U.S. at 810-11.

These safeguards are critical because, unlike in typical litigation, where "the judicial system itself bears no responsibility for the protection of the parties," in a class action "[j]udges effectively serve as guardians of the interests of absent class members

... assuring that their interests are not sacrificed." Carole J. Buckner, "Due Process in Class Arbitration," 58 Fla. L. Rev. 185, 196 (Jan. 2006). Absent class members have no assurance that these minimal due process rights will be safeguarded in arbitration. Indeed, federal courts have consistently held that arbitration does not constitute state action, which is a prerequisite for Constitutional due process rights. *See, e.g., Smith v. American Arbitration Ass'n*, 233 F.3d 502 (7th Cir. 2000); *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999); *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1190-91 (11th Cir. 1995). In short, due process rights that must assiduously be provided in litigation are relegated in class arbitration to the less rigorous, less formal, and less accountable procedures established by arbitrators who are not necessarily lawyers and who lack experience with the constitutional requirements for class-wide disposition of claims.[5] *See* Pet. Br. 34 & n.15.

The absence of such constitutional protection is of concern not only to absent class members, but also to respondents who are subjected to proceedings that, at best, provide questionable finality and

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[5] For example, the AAA website lists qualifications for its arbitrators, which include a "[m]inimum of 10 years of senior-level business or professional experience **or** legal practice." *See* Qualification Criteria for Admittance to the AAA National Roster of Arbitrators, http://www.adr.org/si.asp?id=4223. While the AAA has a separate roster of class arbitrators and requires that at least one arbitrator in each class arbitration panel be chosen from that roster (*see* AAA Supplementary Rule 2(a)), the AAA provides no separate qualifications for its class arbitrators.

respose with respect to absent class members. At the end of the day, the respondent has been deprived of important procedural and substantive rights, without receiving the supposedly reciprocal benefit of terminating claims expeditiously – or at all. And this is true whether the respondent wins, loses, or settles the class arbitration.

c. The Finality of a Class Arbitration Award is Highly Questionable, and There is Limited Judicial Review

Because arbitration agreements are binding only on parties, any potential class members who have no arbitration agreements, or whose agreements do not cover the dispute at issue, will likely be unaffected by the arbitrator's final award. In *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983), this Court held that where a party has related disputes with two different parties – one with an arbitration agreement and one without – each case must proceed in a separate forum. As this Court explained,

> [T]he relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement. Under the [FAA], an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.

Id. (emphasis in original; footnote omitted). It is well-settled, moreover, that a contract cannot bind a non-party. *See, e.g., EEOC v. Waffle House, Inc.*, 534

U.S. 279 (2002). And even contractual parties can be required to arbitrate a given matter only when they have agreed to do so. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995). As a result, in class arbitration, if an arbitrator has issued an award in favor of the plaintiff class, the defendant(s) could still face additional litigation – even class litigation – by purported class members. Most directly, this threat exists for absent class members not subject to an arbitration agreement; but the threat exists as well with respect to absent class members with arbitration agreements who did not receive the full panoply of due process notice and procedural regularity that must precede judgments in class action litigation. Although this burden may reasonably be imposed on those defendants whose contracts expressly permit class arbitration, it is an unreasonable burden for those whose contracts do not.

Likewise, the restrictions on judicial review associated with classwide arbitration are indefensible if imposed on parties who did not contemplate this specialized process. The FAA provides that a court may vacate an arbitrator's substantive award of relief on the merits only in the event of fraud, corruption, bias, misconduct or misbehavior by the arbitrators, or where the arbitrators exceeded their powers or failed to make a "final and definite" award. 9 U.S.C. § 10(a). Courts' powers to modify such an arbitration award are limited to cases involving material miscalculations or mistakes, errors in form, and rulings on issues not before the arbitrator. 9 U.S.C. § 11. These grounds for review may not be expanded by agreement of the

parties, as this Court held in *Hall Street Assoc's v. Mattel, Inc.*, 128 S. Ct. 1396 (2008).

These limitations on judicial review raise serious questions of fairness for all parties to class arbitration. For example, this feature appears to have emboldened some plaintiffs' attorneys to think they have virtually limitless license in class arbitration to pressure defendants. As one stated, "[f]irst and foremost, a decision by the arbitrator with respect to class certification and an ultimate award are virtually non-appealable...a feature which terrifies corporate defendants." Clancy & Stein, *supra*, at 71 (quoting Gary W. Jackson, "Prosecuting Class Actions in Arbitration," 2006 ATLA Ann. Convention Reference Materials 829). Defendants' concerns regarding the coercive impact of a class certification award are entirely understandable. Federal Rule of Civil Procedure 23(f), which gives appellate courts discretion to review class certification decisions, was enacted in part to alleviate unfair pressure on defendants to settle, particularly where the plaintiffs are unlikely to succeed on the merits. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999). Moreover, the limited availability of appellate review in class arbitration should concern plaintiffs as well, especially absent class members who have not participated in the proceedings. Clancy & Stein, *supra*, at 71. These concerns are all the more justified when parties who never contemplated class arbitration are forced into it solely because their arbitration contract did not expressly preclude it.

d. The Procedural Safeguards Some Courts and Arbitrators Have Imposed on Class Arbitration Are Wholly Inadequate

Some private arbitration organizations may provide a few – but not all – of the protections and safeguards described above. For example, the AAA Supplementary Rules allow class arbitration where the arbitrator has determined that numerosity, commonality and typicality requirements similar to those in Federal Rule 23 are met, and where class representative(s) and counsel "fairly and adequately protect the interests of the class." *See* AAA Supplementary Rule 4(a). Likewise, the relevant JAMS rules incorporate by reference certain portions of Rule 23. *See* JAMS Class Action Procedures, Rule 3 (May 1, 2009), *available at* http://www.jamsadr.com/rules-class-action-procedures. But one safeguard for absent class members that is notably absent from the AAA Supplementary Rules is that, although arbitrators may exclude certain members of the class under certain circumstances (AAA Supplementary Rule 5(c)), there is no provision allowing an arbitrator to divide the class into subclasses. Buckner, *supra*, at 252. Division into subclasses is important where subsets of class members have different interests, or even conflicts of interest. *See Amchem*, 521 U.S. 591 (rejecting class due to divergent categories of absent class members).

Further, several state jurisdictions, in an attempt to provide some semblance of due process to absent parties in class arbitrations, created a so-called "hybrid" model of class arbitration. Buckner,

supra, at 226-27. This model contemplates a need for substantial judicial involvement, in which a court would: (1) certify the class, (2) provide notice to absent class members, (3) adjudicate conflicts, (4) monitor arbitrator selection, (5) review the settlement, and (6) generally supervise the arbitration. *See Keating v. Superior Court*, 645 P.2d 1192, 1209 (Cal. 1980), *rev'd in part on other grounds, sub nom., Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991).

Because the FAA neither incorporates nor contemplates any of these additional judicial oversight activities, there is a limit to the protections a court, or a private organization, can provide in class arbitration. So what is a court to do when asked to confirm or vacate a class arbitration award? Must the court ascertain that the arbitrators have afforded the parties – and absent class members – sufficient due process in the arbitral proceedings, including the formalities of notice to class members, opportunities for voicing objections and to be heard in opposition, and determinations of fairness to the class? And if the court determines that the arbitrator failed to provide these basic components of due process, what then? Does the FAA permit the award to be vacated on that ground? And if the court confirms an award despite these deficiencies, how can any party be assured of finality and repose when the rights of absent class members were curtailed? Or, does the court have to provide full Rule 23-like constitutionally-mandated procedures before ruling on confirmation or vacatur (whether or not the arbitrator has already done so)?

To be sure, where parties (including absent class members) have entered into contracts that expressly specify class arbitration as the stated method of dispute resolution, then the absence of such safeguards is something the parties have chosen. In those particular circumstances, fidelity to the contractual terms would warrant class arbitration. But where the parties (including absent class members) have not expressly articulated that waiver of the constitutional protections required for class actions, it is wrong to subject parties to class arbitration.

For all of these reasons, it would be a profound mistake to permit class arbitration to proceed where the contract is "silent" on this pivotal point. The rationale for this conclusion in the context of domestic contracts and disputes is even more compelling in the context of transnational contracts. Under the FAA, international arbitration contracts are subject to treaties and multilateral agreements such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. But, there is serious question that class arbitration could satisfy even the most elementary requirements for an enforceable award under international standards to which the United States is a signatory. For example, the Rules of the Inter-American Commercial Arbitration Commission require that a request for arbitration must contain the names and addresses of the parties. Inter-American Commercial Arbitration Commission Rules, at Art. 3 (amended Apr. 1, 2002), *available at* http://www.adr.org/sp.asp?id=22093. Class arbitration fails that basic test.

Even more important, engrafting the prospect of class arbitration onto transnational contracts that are silent on the issue would disturb the regularity that, as this Court has frequently stated, is necessary for the United States to participate in worldwide commerce. *See, e.g., Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) (holding that adherence to contractual choice-of-law and choice-of-forum provisions was "an almost indispensable precondition to . . . orderliness and predictability essential to any international business transaction"); *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995) (enforcing foreign forum selection clause in international arbitration and noting the practical need to "give way to contemporary principles of international comity and commercial practice"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) ("concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' [arbitration] agreement, even assuming that a contrary result would be forthcoming in a domestic context").

3. Federal Policy Dictates That Class Actions Are Best Adjudicated by the Federal Courts; Thus, No Pro-Class Arbitration Presumption is Warranted

There are additional reasons why the pro-class arbitration presumption employed by the Second Circuit and many arbitrators runs counter to recent

Congressional action designed to ensure that more class action cases are litigated in federal court than in other fora. The Class Action Fairness Act ("CAFA"), 28 U.S.C. §§ 1332(d), 1453 & 1711-1715, passed in 2005, changed the diversity of citizenship jurisdiction statute which had barred most interstate class actions from the federal courts.

Congress passed CAFA in response to evidence of gross abuses of the class action device, particularly in the state courts. Such abuses included the indiscriminate certification of classes, resulting in inordinate pressure on defendants to settle meritless lawsuits. The same concerns that led Congress to prefer a federal forum over a state forum for class action litigation are equally applicable to the hybrid proceedings of class arbitration. In light of Congress' clear preference for class actions to be litigated in federal court, it should be entirely contraindicated for the Court to tolerate a pro-class arbitration presumption.

The Senate report on CAFA noted that state courts took an "'I never met a class action I didn't like' approach to class certification," S. Rep. No. 109-14, at 22 (2005), reprinted at U.S.S.C.A.N. 3, 22 (Leg.Hist.). In recent years, there had been a "dramatic explosion of class actions in state courts" because those courts had not applied Rule 23's requirements for certification with the same rigor as their federal counterparts. *Id.* at 14. The Senate viewed state courts' cavalier attitude toward class certification as unfairly damaging to the rights of plaintiffs and defendants alike, particularly in massive national class actions. *Id.* at 22-27.

Just as Congress was troubled by state courts' haphazard approach to class certification, this Court should be troubled by arbitrators' markedly one-sided approach to clause construction. Although state procedural rules – like those of private arbitral organizations – need not precisely track Federal Rule 23, Congress ultimately measured the fairness of state procedures against the Rule 23 standard, and concluded that the federal courts are best suited to resolve class actions, particularly those with large, nationwide classes.[6] Indeed, Congress could scarcely have expressed itself more clearly on this subject. An entire section of the Senate report is entitled, "National Class Actions Belong in Federal Court...." S. Rep. No. 109-14, at 23, *reprinted in* 2005 U.S.S.C.A.N. 3, 24 (Leg.Hist.).

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[6] Moreover, as one court observed, federal judges have no built-in incentive to certify class actions, particularly large ones. In reversing a district court's class certification order, the Seventh Circuit noted that, "We do not mean to suggest that the district judge is engaged in a deliberate power-grab. We have no reason to suppose that he *wants* to preside over an unwieldy class action." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (Posner, J.) (emphasis in original). But arbitrators, who are paid by the hour, stand to earn more if they allow a class action to go forward than if they do not. This fact has caused some to suggest that arbitrators may even have a conflict of interest in deciding clause construction awards. Clancy & Stein, *supra*, at 73; P. Christine Deruelle & Robert Clayton Roesch, "Gaming the Rigged Class Arbitration Game: How We Got Here and Where We Go Now – Part I," *The Metropolitan Corporate Counsel*, August 2007, at p. 9, *available at* http://www.metrocorpcounsel.com/pdf/2007/August/09.pdf.

When courts – or arbitrators – precipitously certify class actions, this increases the pressure on defendants to settle nonmeritorious claims. *See* p. 17-20, *supra*. The Senate found the use of class actions to obtain "blackmail settlements" especially problematic:

> Because class actions are such a powerful tool, they can give a class attorney unbounded leverage, particularly in jurisdictions that are considered plaintiff-friendly. Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling – rather than litigating – frivolous lawsuits. This is a particularly alarming abuse because the class action device is intended to be a procedural tool and not a mechanism that affects the substantive outcome of a lawsuit.

S. Rep. No. 109-14, at 20, *reprinted in* 2005 U.S.S.C.A.N. 3, 21. In fact, the Senate found that state courts certified such a large number of class actions precisely *because* this would induce defendants to settle rather than face trial. *Id.* at 20-21. And the pressure to settle meritless class *arbitration* may be even greater than the pressure to settle meritless class action *litigation*.

These practical concerns, domestic and international, should inform this Court's resolution of this case. Where neither Congress nor the parties to "silent" agreements have chosen class arbitration, this Court should not endorse a form of proceeding that fails in so many ways. The real world experience since *Bazzle* tells a powerful cautionary tale that this Court should heed.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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